

**UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT**

UNITED STATES OF AMERICA

v.

ARIEL QUIROS *et al.*,

Defendants.

No. 5:19-cr-00076 (GWC)

ECF Case

ORAL ARGUMENT REQUESTED

**DEFENDANT ARIEL QUIROS'S MEMORANDUM OF LAW IN SUPPORT
OF HIS MOTION TO TRANSFER VENUE AND TO ADDRESS CONFLICT ISSUES**

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
BACKGROUND	4
A. The Politicization of the Vermont Regional Center Leads to Considerable Publicity for the Jay Peak and AnC Vermont Projects	5
B. The Jay Peak Projects Start to Receive Adverse Publicity in 2014	16
C. The State Withdraws Support for the AnC Vermont and Other Projects in Response to Adverse Publicity and the SEC Investigation	18
D. Federal and State Officials Turn on Mr. Quiros and His Colleagues in an Effort to Divert Attention from their Own Conduct, Creating a Media Frenzy	19
ARGUMENT	40
I. MR. QUIROS CANNOT RECEIVE A FAIR TRIAL IN THE DISTRICT OF VERMONT	40
A. The Pretrial Publicity Has Been Suffocating and Persistent	42
B. The Coverage Has Been Incendiary	47
C. The Government Bears Responsibility for the Prejudicial Publicity	53
D. Other Factors Support Application of a Presumption of Prejudice	53
II. THE UNITED STATES ATTORNEYS LEADING THIS MATTER HAVE CONFLICTS OF INTEREST THAT REQUIRE DISMISSAL OF THE INDICTMENT OR, AT MINIMUM, AN EVIDENTIARY HEARING	66
A. Due Process Requires a Disinterested Prosecutor	68
B. Miller's and Nolan's Conflicts Create a Reasonable Potential for Prejudice	69
C. The Manner in Which the Investigation Was Conducted Further Supports a Finding of Reasonable Potential for Prejudice and a Finding of Actual Prejudice to Mr. Quiros	72
D. If the Government Wishes to Contest This Motion, an Evidentiary Hearing Is Necessary to Allow for Resolution of These Issues on a Full Record	77
III. THE COURT SHOULD EVALUATE RECUSAL ISSUES FOR THE JUDGES OF THIS COURT	78

CONCLUSION.....	82
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TABLE OF AUTHORITIES

	Page(s)
<u>CASES</u>	
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868 (2009)	78, 80
<i>In re Murchison</i> , 349 U.S. 133 (1955)	78
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	41, 66
<i>Ligon v. City of New York</i> , 736 F.3d 118 (2d Cir. 2013),.....	78, 79
<i>Patterson v. Colorado ex rel. Attorney Gen. of Colo.</i> , 202 U.S. 454 (1907)	41
<i>People v. Zimmer</i> , 434 N.Y.S.2d 206 (N.Y. 1980).....	69
<i>Skilling v. United States</i> , 561 U.S. 358 (2010)	41, 60, 61
<i>State of New Jersey v. Imperiale</i> , 773 F. Supp. 747 (D.N.J. 1991).....	68
<i>Sutton v. Vermont Regional Center</i> , No. 2018-158 (Vt. 2019)	74
<i>United States v. Bakker</i> , 925 F.2d 728 (4th Cir. 1991).....	41
<i>United States v. Camisa</i> , 969 F.2d 1428 (2d Cir. 1992)	78
<i>United States v. Hasarafally</i> , 529 F.3d 125 (2d Cir. 2008)	78
<i>United States v. Jacques</i> , 08-CR-117, 2011 WL 1706770 (D. Vt. May 4, 2011)	passim
<i>United States v. Lovaglia</i> , 954 F.2d 811 (2d Cir. 1992)	79

<i>United States v. Maldonado-Rivera,</i> 922 F.2d 934 (2d Cir. 1990)	42
<i>United States v. Menendez,</i> Cr. No. 15-155 (D.N.J. 2015)	81
<i>United States v. Morris,</i> 2018 WL 2088301 (E.D.N.Y. May 4, 2018)	78
<i>United States v. O'Brien,</i> 18 F. Supp. 3d 25 (D. Mass. 2014)	80
<i>United States v. Rideau,</i> 373 U.S. 723 (1963)	60
<i>United States v. Sabhnani,</i> 599 F.3d 215 (2d Cir. 2010)	42
<i>United States v. Washington,</i> 813 F. Supp. 269 (D. Vt. 1993)	41
<i>Vasquez v. Hillery,</i> 474 U.S. 254 (1986)	68
<i>Wright v. United States,</i> 732 F.2d 1048 (2d Cir. 1984)	69
<i>Young v. United States ex rel. Vuitton et Fils S.A.,</i> 481 U.S. 787 (1987)	68, 69
<u>STATUTES</u>	
28 U.S.C. § 455(a)	4, 78, 79
28 U.S.C. § 528	68
<u>RULES</u>	
Federal Rule of Criminal Procedure 21(a)	1, 41
<u>REGULATIONS</u>	
28 C.F.R. § 45.2(a)	68, 69
8 C.F.R. § 204.6	4

OTHER AUTHORITIES

United States Attorney's Manual § 3-1.140 71

Defendant Ariel Quiros respectfully submits this memorandum of law in support of his motion to transfer venue pursuant to Federal Rule of Criminal Procedure (“Rule”) 21(a) and this Court’s Orders dated July 15, 2019 [ECF No. 45] and September 23, 2019 [ECF No. 64]; to dismiss the Indictment or hold an evidentiary hearing based on conflicts of interest of the United States Attorneys leading this matter; and to request an evaluation of recusal issues for the Judges of this Court.

PRELIMINARY STATEMENT

Mr. Quiros cannot receive a fair trial in the District of Vermont because the jury pool has been saturated with inflammatory pretrial publicity.¹ The Court should transfer venue to another District Court in this Circuit because this case presents the rare situation where the presumption of prejudice applies based on both the volume and inflammatory nature of the pretrial publicity.

Spurred on by the Government and other federal and State politicians who have scapegoated Mr. Quiros to deflect attention from their own involvement in the charged conduct, the Vermont media have convicted Mr. Quiros before he has had his day in Court. Not only has the media branded this case as the “Kingdom Con” and “the largest fraud” in Vermont history, but Mr. Quiros has become Vermont’s public enemy number one. Indeed, the Vermont newspaper with the largest circulation published a cartoon celebrating Mr. Quiros’s imminent homicide. And there have been well over a thousand print and broadcast stories about Mr. Quiros, the EB-5 projects with which he was associated, and the federal and state cases filed against him. He has

¹ Cited print media are attached as Exhibits 2-164 to the Declaration of Seth L. Levine in Support of this Motion. Audio and broadcast media are cited in footnotes herein with the corresponding website. All audio and broadcast media available in a downloadable format are being provided to the Court and the Government on a thumb drive for convenience. Where the media is only available online, we have included the website and noted “not available for download” in the footnote.

been compared to Bernie Madoff, Carlo “Charles” Ponzi, General Custer, and the Trump family. He has been referred to as a “skunk” and a “shady operator” and convicted in the court of public opinion of “stealing the hopes of Vermonters”—despite the fact that neither this case nor any other has even alleged, let alone proven, that a single Vermonter was victimized.

Government officials bear responsibility for much of the inflammatory coverage. The EB-5 projects referenced in the Indictment were Vermont State projects. As a result, many of Vermont’s elected officials and political appointees sought to publicize their involvement with these projects, especially given their economic success, including bringing thousands of jobs to an economically depressed part of the State. In fact, these officials were active participants in the alleged fraudulent conduct underlying the charges in this case. But after accusations were made in civil lawsuits against Mr. Quiros, government officials engaged in a media campaign to deflect attention from their own conduct by casting Mr. Quiros, Mr. Stenger, and Mr. Kelly as villains responsible for the ills that have befallen the Northeast Kingdom. For example, as one media outlet reported, Vermont’s then-Governor, Attorney General, and Department of Financial Regulation Commissioner held a press conference intended to spur the masses “to take up their pitchforks” against Mr. Quiros and Mr. Stenger. That mission was accomplished, and much of the prejudicial press coverage merely parroted back the inflammatory statements of Vermont’s federal and state officials.

The United States Attorney is also personally responsible for prejudicial publicity. In the years leading up to the Indictment, the press dubbed a razed block in downtown Newport as “the hole” or “the pit” and, following the lead of federal and state government officials, made it the symbol of the charged fraud, even though the civil lawsuits did not include allegations relating to “the hole.” With full knowledge of this misleading media coverage, the United States Attorney

chose to hold a press conference announcing the Indictment at “the hole” even though the razing of the buildings in Newport has nothing to do with this case. Multiple media stories were run following the United States Attorney’s statements that misleadingly linked “the hole” to the Indictment’s allegations. As one local media outlet reported in July 2019, the razed block in downtown Newport was “the physical embodiment of the scandal.” In fact, the cartoon referenced above celebrating Mr. Quiros’s imminent homicide was published shortly after the United States Attorney’s press conference and depicted “the hole” as Mr. Quiros’s grave.

Given the prejudice to Mr. Quiros from the pervasive and inflammatory pretrial publicity that has surrounded this case, he cannot receive a fair trial in the District of Vermont. The Court should therefore grant his pretrial motion to transfer venue to another District in this Circuit.

In addition, the United States Attorneys leading this matter have conflicts of interest that require dismissal of the Indictment or, at minimum, an evidentiary hearing. The two United States Attorneys who oversaw this matter for the Government—Eric Miller and Christina Nolan—have personal relationships with officials who were substantially involved in the conduct at issue in this case, including Senator Leahy and Miller’s wife, Elizabeth (“Liz”) Miller, who previously served as Governor Shumlin’s Chief of Staff and is on the Government’s Preliminary Witness List. While the Department of Justice directed that Miller recuse himself, his recusal did not occur until after the investigation had been underway for approximately a year. Nolan has never recused herself and continued the investigation on the same course set by Miller. These conflicts appear to have tainted the investigation, and like the publicity, steered it away from developing an objective factual record on the key role the senior federal and state officials played in this matter. Based on Miller’s and Nolan’s failure to properly recuse themselves, Mr. Quiros has made a *prima facie* showing of a violation of his due process right to a disinterested prosecutor which, if unrebutted,

should result in a dismissal of the Indictment and/or disqualification of certain prosecutors. At minimum, the Court should hold an evidentiary hearing with appropriate discovery prior to the hearing, to allow this issue to be resolved on a full record.

Finally, the Court should evaluate recusal issues for the Judges of this Court under the Due Process Clause and 28 U.S.C. § 455(a). Vermont's federal and state elected officials, including, but not limited to, Senators Patrick Leahy and Bernie Sanders, Representative Peter Welch, and former Governors Peter Shumlin and James Douglas are expected to be witnesses in this case. While Mr. Quiros is not suggesting that the Court has done anything improper or holds any bias, he respectfully submits that the Court should evaluate whether these relationships objectively create an appearance of partiality requiring recusal.

BACKGROUND

The Indictment charges Mr. Quiros with offenses arising from an alleged scheme to defraud in connection with the federal EB-5 program, which provides an opportunity for foreign investors to become lawful United States permanent residents. (Indictment ¶ 20.) Immigrant investors seeking EB-5 visas may pool their investments in private or public entities known as “regional centers” that have been approved by the United States Citizenship and Immigration Service (“USCIS”), the federal agency responsible for the EB-5 program. 8 C.F.R. § 204.6 (2019). The EB-5 projects referenced in the Indictment belonged to the Vermont Regional Center, which was run through the Agency of Commerce and Community Development (“ACCD”) and was then the only regional center “owned, controlled and supervised directly by a state government.” (Declaration of Seth L. Levine (“Levine Decl.”) Ex. 39; *see also* Indictment ¶ 15.)

The Indictment references seven Vermont Regional Center EB-5 projects. Six of these projects related to construction at the Jay Peak resort (the “Jay Peak Projects”), and are not alleged

to be part of the scheme to defraud. (*See, e.g.*, Indictment ¶¶ 16, 20.) Rather, the alleged scheme to defraud pertains only to a Vermont Regional Center project that the Indictment refers to as the “AnC Vermont EB-5 project” (the “AnC Vermont Project,” or the “Project”). (*Id.* ¶ 20.) The AnC Vermont Project involved the construction and operation of a biotechnology facility in Newport, Vermont. (*Id.* ¶ 6.)

**A. THE POLITICIZATION OF THE VERMONT REGIONAL CENTER LEADS TO
CONSIDERABLE PUBLICITY FOR THE JAY PEAK AND ANC VERMONT PROJECTS**

Because the Jay Peak and the AnC Vermont Projects were State projects operated through the Vermont Regional Center, Vermont’s federal and state elected officials played a significant role in marketing these projects and soliciting foreign investors. Vermont’s entire Congressional delegation—Senator Patrick Leahy, Senator Bernie Sanders and Representative Peter Welch—and two now-former Vermont Governors—James Douglas and Peter Shumlin—participated in marketing and promotional events, and letters written by Senator Leahy and Governor Shumlin were included in the AnC Vermont Project offering materials. In addition, Senator Leahy, Governor Douglas and Governor Shumlin made multiple foreign trips to solicit investors for the Jay Peak and AnC Vermont Projects. The extensive involvement of Vermont’s elected officials and other government employees, as well as their politicization of the successes that the EB-5 projects achieved, resulted in considerable publicity for the Jay Peak and AnC Vermont Projects long before any allegations of wrongdoing.

**1. Senator Leahy Solicits Irish Investors and Invites Mr. Stenger to
Testify on Capitol Hill Regarding the Jay Peak and AnC Vermont
Projects**

Senator Patrick Leahy was one of the biggest proponents of the Vermont Regional Center and the Jay Peak and AnC Vermont Projects. Senator Leahy’s involvement with EB-5 and the Jay Peak Projects pre-dates Mr. Quiros’s purchase of the Jay Peak Resort. For example, Senator Leahy

introduced legislation in March 2008 to reauthorize the Regional Center Program. (Levine Decl. Ex. 2.) While this legislation was pending, Leahy accompanied Mr. Stenger on a trade mission to Ireland to discuss the Jay Peak Projects with potential Irish investors in November 2008. (Levine Decl. Ex. 3 at 3.)

In connection with the reauthorization of the Regional Center Program, Leahy invited Mr. Stenger to testify before the Senate Judiciary Committee in July 2009. (Levine Decl. Ex. 4.) In introducing Mr. Stenger at the hearing, Senator Leahy agreed with Mr. Stenger's characterization of Jay Peak as "one of the most successful EB-5 developments in the country." (Levine Decl. Ex. 5 at 7.) During his testimony, Mr. Stenger referenced the AnC Vermont Project, which was then in the planning stage, as well as Alex Choi, whom the Indictment alleges was the "hidden partner" in the project (Indictment ¶ 21):

I met Alex Choi in Korea a couple of years ago and we're now working together on bringing a biotech research, development, and manufacturing facility to the northern tier of Vermont, something that you would have thought a few years ago would be an impossibility, but it's a real possibility now and it's a tangible thing that we're working on right away.

(Ex. 5 at 8; *see also* Levine Decl. Ex. 6.)

2. Governor Douglas Solicits Asian Investors in 2009 and Publicly Launches the AnC Vermont Project

On the heels of Mr. Stenger's testimony and the accompanying publicity, then-Governor Jim Douglas announced that he and a delegation that included Mr. Stenger planned to travel in October 2009 to South Korea, Taiwan, and other Asian destinations to solicit additional EB-5 investors. (Levine Decl. Ex. 7 at 1; Ex. 8 at 1.) In August 2009, Governor Douglas issued a press release publicizing the trip that highlighted the "success[]" of the Jay Peak Projects and included a quote from Mr. Stenger emphasizing that "'the State of Vermont's support is critical to establishing the credibility of this program.'" (Levine Decl. Ex. 8 at 1.)

Two days into the Asian trip, Douglas appeared with Mr. Quiros, Mr. Stenger, and Mr. Choi at a ceremony in South Korea to sign the original AnC Vermont Project Memorandum of Understanding designating this Project as an official Vermont Regional Center Project. (Levine Decl. Ex. 141 (*see* photograph dated Oct. 23, 2009); Ex. 147.) The Governor's Office issued a press release that day touting the AnC Vermont Project:

On their first full day in Asia, Governor Douglas and Commerce Secretary Kevin Dorn finalized plans with Jay Peak Resort President Bill Stenger and his partners, South Korean company AnC Bio Inc., to designate its new subsidiary, AnC Bio VT, LLC as an official Vermont EB-5 Regional Center Project. AnC Bio VT is now raising money for a planned new facility in Orleans County that will lead to the creation of over 200 new jobs.

“On behalf of the people of Vermont, I want to welcome AnC Bio to Vermont. This is an exciting opportunity that can bring hundreds of high-tech, good paying jobs to our state,” Governor Douglas said. “Thanks to the EB-5 program, our economic development team and Bill Stenger – who was instrumental in bringing this company to Vermont – we are bringing millions in new investment to Vermont businesses and hundreds of new jobs to our state at this critical time. This company and others we are meeting with will bring important job opportunities to the people of our state.”

(Levine Decl. Ex. 9 at 1; *see also* Levine Decl. Ex. 10 at 1-2 (quoting Douglas's release).) Upon returning to Vermont, Governor Douglas characterized his trip as a “tremendous success” in increasing the number of EB-5 investors putting money into Vermont and shared his expectation that the trip would result in between 35 and 40 EB-5 investors in state businesses. (Levine Decl. Ex. 11 at 1.)

3. Senator Leahy and Governor Douglas Continue to Promote the EB-5 Projects in 2010

Senator Leahy's and Governor Douglas's continuing promotion of the Jay Peak and AnC Vermont Projects led to additional publicity in 2010. For example, in July 2010, Senator Leahy participated in a groundbreaking ceremony for the second phase of the Jay Peak Projects. (Levine Decl. Ex. 12 at 1.) In October 2010, Governor Douglas made another trip to Asia to solicit EB-5

investors for the Jay Peak and AnC Vermont Projects, stopping in Hong Kong, Tokyo, Beijing, Shanghai, and Ho Chi Minh City. (Levine Decl. Ex. 13 (describing Governor Douglas's upcoming trip to Asia); Ex. 14 (same).) At each stop, Douglas and other Vermont state representatives held a seminar explaining the projects to potential investors. (Levine Decl. Ex. 14 at 1.) As reflected in a video showing a portion of his interactions with investors, Governor Douglas touted the significance of the State's role in the EB-5 projects as a means of inducing investment, stating:

Perhaps most importantly for our discussion this evening, Vermont's EB-5 Regional Center is the only one in the nation that is administered by the State Government. We have a 100 percent record of our projects and our investors being approved by the federal government, and that is something of which we are very proud. Although the State does not guarantee the investment's return, we do provide oversight and monitoring of the projects and the investments that are made in them.²

4. The Shumlin Administration and Senator Leahy Generate Additional Publicity for the Jay Peak and AnC Vermont Projects Upon Peter Shumlin's Election as Vermont's Governor

During the campaign for the 2010 gubernatorial election, Peter Shumlin made Governor Douglas's EB-5 investor trips a campaign issue and characterized them as "junkets." (Levine Decl. Ex. 15 at 1.) Once elected, however, Governor Shumlin reversed course and embraced the Vermont Regional Center and the AnC Vermont Project. Even prior to the start of Shumlin's term, Senator Leahy's office pressured Shumlin to reference the EB-5 program and Leahy's leading role in all of Vermont's EB-5 projects in his inaugural address. As recently revealed in documents that the State has suppressed for years, a senior member of Leahy's office wrote to Shumlin's incoming chief of staff in January 2011 that "on EB5 you need to recognize Leahy and only Leahy." (Levine

² USIS Group, *U.S. Governor Jim Douglas Introduces the EB5 Immigration Investment Program* (title translated using Google translate), YOUTUBE (Mar. 9, 2016), <https://www.youtube.com/watch?v=7tBmdN8Fft0&t=30s> at 04:03 – 04:52.

Decl. Ex. 161 at 2.) As per Leahy's instructions, Shumlin lauded Leahy's work on the EB-5 program in his inaugural address and singled out Mr. Stenger and the Jay Peak Projects for particular praise as he made the expansion of EB-5 a key part of his 2011 jobs agenda:

The EB-5 program, championed in Congress by Senator Leahy, is an established means of generating capital that is creating jobs. Thousands of them, right here in Vermont. We must take this program to levels not imagined by its creators. EB-5 gives us a vehicle not only to raise essential capital, but also to spread Vermont's stellar reputation from one end of the globe to another.

We have a pioneer in this effort, Bill Stenger, of Jay Peak, deep in the Northeast Kingdom, who joins us today. Bill has plumbed this federal program to its fullest potential. Through this initiative he has created over a thousand new jobs in the highest unemployment area of the state that would not otherwise exist.

(Levine Decl. Ex. 16 at 6.)

Like his predecessor, Shumlin promoted the AnC Vermont Project and solicited investors for it. In August 2011—eight months after taking office—Shumlin appeared with Senator Leahy at the Gateway Center in Newport to present the AnC Vermont Project as “a new biomedical research and manufacturing plant that will bring hundreds of jobs to the village.” (Levine Decl. Ex. 17 at 1.) The elected officials discussed how the project will help Newport, with Governor Shumlin proclaiming that the project would provide ““jobs, jobs, jobs for the 21st century.”” (*Id.*)

Several months later, in November 2011, Shumlin traveled to Florida to solicit Latin American investors for Vermont's EB-5 projects, including projects involved in this case. (Levine Decl. Ex. 18.) Then-ACCD Secretary Lawrence Miller advised the press that the trip's purpose was to entice investors and work with immigration attorneys who use Miami as a hub. (*Id.*) On his return, Shumlin spoke as the keynote speaker at the Vermont Chamber of Commerce annual meeting which honored Mr. Stenger as Vermont's Citizen of the Year. (Levine Decl. Ex. 19.) Shumlin praised Mr. Stenger as an “extraordinary Vermonter” and “the Michelangelo of EB-5.” (*Id.* at 1.)

5. The September 2012 Press Events

In September 2012, Governor Shumlin promised a “major economic announcement” that involved the delivery of 5,000 new jobs to northern Vermont. (Levine Decl. Ex. 20 at 1.) Shumlin advertised the announcement during his weekly news conference, inviting his audience and the press to “[c]ome with us tomorrow. We’re going to tell a story tomorrow about the Northeast Kingdom, which has suffered from some of the highest unemployment rates in Vermont for years that I never thought would be able to be told in my wildest dreams.” (Levine Decl. Ex. 22 at 1; *see also* Ex. 21.)

The “story” was covered extensively by the Vermont media as it unfolded on September 27, 2012, over the course of three press events attended by Senator Leahy, Senator Bernie Sanders, Representative Peter Welch, and Governor Shumlin at Jay Peak, Burke Mountain Resort, and the Newport State Airport (the “September 2012 Press Events”). (Levine Decl. Ex. 23 at 1; *see also* Ex. 20.) It involved seven economic projects, including the AnC Vermont Project, that had an aggregate value of \$500 million and were billed as potentially bringing as many as 10,000 new jobs to the Northeast Kingdom. (Levine Decl. Ex. 23 at 1.) In prepared remarks, Senator Leahy touted Mr. Quiros, Mr. Stenger and Mr. Kelly, as well as the significance of the State of Vermont’s role in the EB-5 projects:

About a year ago, the Vermont Chamber of Commerce recognized Bill [Stenger] as Vermont’s 2011 Citizen of the Year – largely in recognition of what he has given to the Northeast Kingdom already. . . . Today I am proudly wearing a pin from that night that proclaims “I know Bill”. After today’s announcement, there are going to be a few more people who know who you are and what you are doing.

The EB-5 regional center program has incentivized hundreds of millions of dollars of foreign investment here in America. It has created tens of thousands of jobs across the country. It has spurred more than two hundred million worth of investment here in Vermont. It has created thousands of jobs here in the Northeast Kingdom alone. Perhaps most importantly, it has not cost the tax payer a single penny.

...

Perhaps the most important reasons I support this program are standing right here in this room: Bill, Ari, the “other Bill” – Bill Kelly – and Governor Shumlin. There are a few thousand other reasons I support the program not too far outside of this room: the men and woman who built this resort, who work in the waterpark, who make the snow on this mountain (not that it needs all that much man-made snow), and who run the Jay Country Store, or who run the stores in downtown Newport. As they say, the proof is in the pudding. Bill, you make a hell of a pudding.

...

But what made and makes Vermont’s regional center unique is that it is state run. The Agency of Commerce and Community Development – ably in the hands of Governor Shumlin and Secretary Lawrence Miller – review potential EB-5 projects and put the state’s stamp of approval on the project. This partnership is one of the keys to success of a place like Jay, or a place like Newport, or a place like Burke. I want to commend Governor Shumlin, and his predecessors, for the care they’ve given to this program.

I have seen firsthand the impact the Vermont regional center process can have on a potential investor. In 2008, Bill and I traveled to Ireland together. . . . On that trade mission, Bill introduced me to a few hundred of his closest Irish friends interested in investing. They had confidence in Bill, but they also had confidence in Vermont.

(Levine Decl. Ex. 24 at 1-2.)

Given the participation of Vermont’s Governor and entire congressional delegation, the September 2012 Press Events were attended by hundreds of local residents (Levine Decl. Ex. 28) and reported on by multiple local media outlets with headlines such as “Booming News Expected Throughout the Kingdom: Bill Stenger, Officials Scheduled To Make Big Economic Announcements Today; 5,000 Jobs Said To Be Coming” (Levine Decl. Ex. 25 (*Caledonian Record*)); and “A real big deal” (Levine Decl. Ex. 26 (*The Burlington Free Press*)). Mr. Quiros and his partners were photographed with the delegation (pictured from left to right), Representative Welch, Mr. Stenger, Senator Leahy, Senator Sanders, Governor Shumlin, Mr. Quiros, and Mr. Kelly:



(Levine Decl. Ex. 108 at 2; *see also* Ex. 125 at 1; Ex. 142 at 9.)

In an editorial entitled “Stimulus by Stenger” published shortly after the September 2012 Press Events, the *Caledonian Record* wrote:

In Vermont we hear the oft-repeated Peter Shumlin claim that his administration “added 7,500 new jobs in the state of Vermont since we got elected two years ago.” The assertion was debunked as “mostly false” by the investigative news site VtDigger.org, which explained “Using his own criteria, the correct number would be 1,700.” The fact-check finds Shumlin guilty of “cherry-picking the best numbers available to him,” of exaggerating the state’s job growth. This is not a phenomena unique to Shumlin, of course. Lacking a decent record – particularly during an economic crisis – a politician has to be a heck of a salesperson or, well, a bit of a liar.

But while the politicos are busy over-stating their importance and brilliance, the Northeast Kingdom has truly been blessed with the transformational figures of Bill Stenger and Ari Quiros. That duo spent Thursday spreading jaw-dropping good news throughout our area. Their announcements brought the promise of jobs - lots of them – and with that, hope.

...

[N]one of this happens without Stenger and Quiros. That blessed pair is transforming our region in unprecedented, magnificent ways for which we are grateful.

(Levine Decl. Ex. 27 at 1.) Other local media outlets issued similar pieces. (See Levine Decl. Ex. 29 (*Times Argus*); Levine Decl. Ex. 31 (*Burlington Free Press*).)

6. Governor Shumlin and Senator Leahy Wrote Letters Endorsing the AnC Vermont Project that Are Included in the Offering Materials

Following the September 2012 Press Events, both Senator Leahy and Governor Shumlin wrote letters to Mr. Quiros and Mr. Stenger endorsing the AnC Vermont Project that were included as Exhibits A and C to the offering materials provided to prospective investors. Senator Leahy's letter, dated October 9, 2012, stated, in relevant part:

I was so pleased to be part of the AnC Bio Vermont project launch recently. With the three-year extension of the EB-5 program now signed into law, I believe AnC Bio Vermont is in a great position to succeed.

...

One of the things that is so valuable about AnC Bio Vermont is the anticipated scope of job creation and the quality of those jobs. Your investors can be proud of this job-creating economic development project and the positive impact it is having and will have on the Newport region of Vermont.

Bill, Jay Peak is a leader in EB-5 project success and I am very pleased you are assisting the AnC Bio Vermont team. I have every hope and expectation that AnC Bio will achieve the same success that Jay Peak's projects have had. The proposed project is a win-win situation for the investors, the community and AnC Bio Vermont. I am proud to support your efforts and look forward to celebrating the project's completion with you.

Keep up the good work. Please feel free to contact me directly should you need assistance as you implement your plans

(Levine Decl. Ex. 152 at 1.) In a letter dated October 3, 2012, Governor Shumlin wrote:

What a great EB-5 project you have created with the AnC Bio Vermont Program. I'm so pleased that this investment is being made in Newport, Vermont and that it will result in so much quality employment for the region. This project being organized by Jay Peak will certainly be successful and have the same positive impact that the Jay Peak projects have had on our state.

AnC Bio Vermont will produce a variety of bio-medical products that will have worldwide market appeal. It will also offer a wide compliment of “Clean Rooms” for the benefit of colleges, universities and small bio-science companies around the world, I’m especially pleased that AnC Bio Vermont has established a strong working relationship with the University of Vermont, our state’s most prestigious research university.

I look forward to the future success of the AnC Bio Vermont project and am available to meet at any time to assist in its development.

(Levine Decl. Ex. 149 at 1.)

7. Governor Shumlin Continues to Attract Publicity for the Jay Peak and AnC Vermont Projects During His Second Term

During his second inaugural address in January 2013, Shumlin discussed both the AnC Vermont Project and Mr. Quiros and Mr. Stenger, stating:

The need for skilled workers goes on and on.

Perhaps that need is best embodied in the Northeast Kingdom, the area of our state that for generations has struggled with chronically high unemployment rates and low incomes, where Bill Stenger and Ari Quiros continue to shine a beacon of hope, opportunity and future prosperity.

For Bill and Ari, investing \$250 million, and creating 5,000 new jobs over the past 5 years while they built a world-class resort at Jay Peak, is not enough. They are moving on to Phase II, a project of unprecedented ambition, which partners with Senator Leahy’s EB-5 program and my administration to grow prosperity in other regions of the Kingdom with \$600 million in new investment, creating 10,000 new jobs.

Some of those jobs will be at AnC Bio, a South Korean company that conducts cutting edge stem cell and artificial organ research and will be looking for scientists and other well-paid technicians. . . . A world-class resort that will be built in downtown Newport on beautiful Lake Memphremagog, will need hundreds of workers, as will the revitalization at Burke Mountain.

I will be traveling with Bill and Ari to South America, Asia and other ports to help secure capital for this project, and in the months ahead, additional announcements of job opportunities are likely to be forthcoming as they are secured.

(Levine Decl. Ex. 32 at 2-3.)

As he pledged during his inaugural address, Shumlin made multiple trips during his second term to promote the Jay Peak and AnC Vermont Projects. These included traveling to Miami in

February 2013, South America in March 2013, and Asia in September 2013. (Levine Decl. Ex. 33; *see also* Exs. 34, 37 & 38.) For example, on a trip to China, Shumlin was accompanied by at least three Vermont Regional Center officials, Secretary Lawrence Miller, director Brent Raymond, and foreign investment specialist Becky Fu, in addition to Mr. Stenger and Mr. Quiros. (Levine Decl. Exs. 36 & 41.) As with his prior EB-5 trips, Shumlin's trips during his second term generated extensive publicity. (*See, e.g.*, Levine Decl. Ex. 33 (*Burlington Free Press*); Ex. 36 (*Caledonian Record*); Ex. 37 (*Burlington Free Press*); Ex. 38 (*Burlington Free Press*); Ex. 40 (*Caledonian Record*); Ex. 41 (*Rutland Herald*); Ex. 42 (*Times Argus*); Ex. 43 (*Associated Press*); Ex. 44 (*Times Argus*).)

Shortly before the trip to China, Shumlin was interviewed by *Vermont Public Radio* and explained the importance of his role in inducing foreign investments on these trips:

Q: Why is it so important for you to go specifically? I mean if you are going to be going to various places, talking to investors and talking to advisors in China – I don't mean this rudely, but are they going to know who you are? I mean does it matter that they're speaking to the Governor of Vermont?

SHUMLIN: Believe it or not it does. And you know, as I talk to my other Governors who do a lot of – *I call it digging for gold in Asia* – whether they're trying to bring jobs in or whether they're trying to export product – in Asia you have to understand that the – obviously in China, in Vietnam, both countries I'll be in, power is government. In other words, if you have a government position in those countries, you have real clout and real power. *So when someone shows up from another government, that's actually probably the most important ingredient for them in understanding that they're talking about something that's real and that they're not, you know, just being deceived.*³

³ Jane Lindholm & Ric Cengeri, *Governor Peter Shumlin*, VERNONT PUBLIC RADIO (Sept. 17, 2013), <https://www.vpr.org/post/governor-peter-shumlin-0#stream/0> at 03:57 – 04:50 (emphasis added).

Shumlin also confirmed during the interview that his trip to China was “exclusively” in support of the Jay Peak and AnC Vermont Projects.⁴ Senator Leahy and Representative Welch also traveled to Asia to enlist EB-5 investors. (Levine Decl. Ex. 45 at 1.)

Shumlin took credit for his work on these EB-5 projects during his campaign for a third term. For example, during the gubernatorial debate in September 2014 as reported by the *Caledonian Record*, Shumlin

boasted about his sterling record of creating jobs. He held up the Northeast Kingdom as a shining example of how his initiatives have benefited the whole state. “We have the fastest growth rate on jobs in Vermont’s history in the Northeast Kingdom because we’re up there, creating jobs,” Shumlin said. “I’ve worked hard to bring capital into the state to grow those jobs.”

(Levine Decl. Ex. 47 at 1.) Shumlin’s boasts about bringing capital into Vermont and creating jobs in the Northeast Kingdom were clear references to his recruitment of investors on the Jay Peak and AnC Vermont Projects.

B. THE JAY PEAK PROJECTS START TO RECEIVE ADVERSE PUBLICITY IN 2014

In July 2014, the *Vermont Digger* published a story about a number of investors in one of the Jay Peak Projects who were unhappy because Mr. Quiros and Mr. Stenger lawfully converted their investments from equity stakes to debt. (Levine Decl. Ex. 46.) This story was one of the *Vermont Digger*’s top ten most viewed stories for 2014. (Levine Decl. Ex. 52 at 2.) The *Vermont Digger* followed up on this story with a report about investors who were unhappy with the relationship between the Vermont Regional Center and Mr. Stenger. (Levine Decl. Ex. 48.) This story also reported on a 2013 Jay Peak promotional video in which Governor Shumlin represented to would-be investors that “Vermont is the only EB-5 program that covers the entire state of

⁴ *Id.* at 06:00 – 06:01.

Vermont and is *audited by the state of Vermont*. . . . We make sure that our EB-5 program offerings are good investments for the investor, and good economic development job creators for the state of Vermont.” (*Id.* at 5 (emphasis added).)⁵ In 2014, ACCD General Counsel John Kessler characterized this representation as a ““misstatement”” because according to Kessler, the state had not conducted financial audits. (Levine Decl. Ex. 48 at 5-6.)

Approximately one week after the *Vermont Digger* published this story, then-ACCD Secretary Patricia Moulton wrote an op-ed criticizing this reporting as “inaccurate.” Moulton stated:

The story implies that it is inappropriate for the state to coordinate PR and marketing efforts related to the EB-5 projects. On the contrary, U.S. Citizenship and Immigration Services (USCIS) — a component of the Department of Homeland Security, requires that EB-5 Regional Centers market and promote projects as part of the program’s economic development goal. It is entirely appropriate and expected for the state to coordinate PR and marketing efforts related to the EB-5 program here and abroad with the private businesses that participate in it and to be concerned about the reputation of the center and its projects.

(Levine Decl. Ex. 49 at 2.) Moulton also commented on the *Vermont Digger*’s reporting on the Shumlin video and Mr. Kessler’s response thereto:

The article states that Gov. Peter Shumlin “touted” the state’s audits of EB-5 programs in a video. Jay Peak was the first EB-5 project in the state and the guiding legal document or memorandum of understanding was signed in 2006. Since Brent Raymond became director of the Vermont Regional Center two years ago, new MOUs signed with subsequent EB-5 projects are required to have financial audits. Gov. Shumlin’s comment, made off the cuff at a media event, was accurate in referring to MOUs written today, but not for the old Jay Peak MOU. Nonetheless, the state did demand that Jay Peak remove the video to avoid any confusion.

(*Id.*)

⁵ See also *Vermont Digger, 2013 Jay Peak Resort EB 5 Program*, YOUTUBE (Apr. 18, 2016), https://www.youtube.com/watch?time_continue=1&v=MwmoKrpYIu8 at 2:41 – 3:05.

C. THE STATE WITHDRAWS SUPPORT FOR THE ANC VERMONT AND OTHER PROJECTS IN RESPONSE TO ADVERSE PUBLICITY AND THE SEC INVESTIGATION

At the time of Moulton’s op-ed piece, the Vermont Regional Center was withholding approval of the AnC Vermont Project’s revised offering materials. In June 2014, following Mr. Quiros’s and Mr. Stenger’s first appearances to give testimony to the SEC at the end of May 2014, the Vermont Regional Center had directed Mr. Quiros, Mr. Stenger and Mr. Kelly to cease marketing the AnC Vermont Project pending approval of more detailed offering materials (*see* Indictment ¶ 29).

In late 2014, the general contractor for the AnC Vermont Project, Jerry Davis, expressed his frustration to the press about the Vermont Regional Center delay, commenting that “We didn’t see that coming.” (Levine Decl. Ex. 51 at 2.) Mr. Davis also advised the press that he had been scheduled to start construction in October, but the delays had sidelined about 100 construction workers who were the “likely bid winners as subcontractors on the project.” (*Id.*)

Behind the scenes—after it was publicly reported on March 25, 2015 that Shumlin had asked the Department of Financial Regulation to investigate the AnC Vermont Project (Levine Decl. Ex. 54)—Shumlin prodded the Vermont Regional Center at a meeting on March 27, 2015 to approve the revised offering materials and to allow the AnC Vermont Project to return to market in April (Levine Decl. Ex. 56 at 7 (noting Shumlin’s role at a March 27, 2015 meeting in helping to end the stalemate between the developers and the Department of Financial Regulation); *see also* Indictment ¶ 29). Shumlin subsequently refused to comment publicly on whether he and the state continued to support the AnC Vermont Project and he did not attend the AnC Vermont Project’s groundbreaking ceremony in May 2015. (Levine Decl. Ex. 56 at 7.)

While the Department of Financial Regulation allowed the AnC Vermont Project to go forward in April 2015, it imposed restrictions on the use of funds for the AnC Vermont Project

and other projects that interfered with paying contractors for work done and consequently generated additional publicity. As reported in a *Vermont Digger* article,

The general contractor for an EB-5 funded hotel and conference center development at Q Burke Resort says the state is holding up payments for completed work.

The general contractor in charge of building a resort hotel in the Northeast Kingdom said he's caught in the crossfire between the project's developers and state regulators, resulting in payment delays that might force him to abandon the \$120 million project.

Jerry Davis, president of PeakCM, the construction firm managing the 180,000-square-foot development at Q Burke Resort, blames the state.

"I'm at my breaking point," Davis says. "I'm thinking of stopping the job. It's delayed the hotel because when subs don't get paid they slow down."

"Ninety percent of the issue is caused by the state's inability to manage the (payment) approvals," Davis says. "We don't want to shut it down. All we want to do is finish the project under budget and on schedule."

(Levine Decl. Ex. 57 at 1.) PeakCM was also the general contractor on the AnC Vermont Project (*id.* at 3), and other local media outlets similarly reported on the threat to walk off the job (*see, e.g.*, Levine Decl. Ex. 58 at 1; *see also* Ex. 69). The media also reported on the Department of Financial Regulation's restrictions on the AnC Vermont Project's use of funds. (*See, e.g.*, Levine Decl. Ex. 59).

D. FEDERAL AND STATE OFFICIALS TURN ON MR. QUIROS AND HIS COLLEAGUES IN AN EFFORT TO DIVERT ATTENTION FROM THEIR OWN CONDUCT, CREATING A MEDIA FRENZY

1. The SEC and the State Announce Charges against Mr. Quiros and Mr. Stenger

In April 2016, the SEC and the State filed coordinated complaints against Mr. Quiros, Mr. Stenger and the sponsor entities for the Jay Peak and AnC Vermont Projects. Both the SEC's and the State's allegations are broader than the charges in the Indictment as they each alleged fraud in connection with the Jay Peak Projects as well as the AnC Vermont Project. (*See* Levine Decl.

Exs. 61 & 63.) The SEC complaint, filed in the Southern District of Florida, contained unnecessarily hyperbolic language, accusing Mr. Quiros and Mr. Stenger of engaging in a “massive fraudulent scheme” and “systematically loot[ing]” the money invested in these projects. (*Securities and Exchange Commission v. Quiros, et al.*, No. 16-CV-21301, S.D. Fla. (Apr. 12, 2016), ECF No. 1 (“SEC Complaint”) ¶ 1). The SEC’s litigation release was more hyperbolic still, asserting that Mr. Quiros and Mr. Stenger acted in “Ponzi-like fashion.” (Levine Decl. Ex. 74 at 1.) The inflammatory “Ponzi” reference did not appear in the complaint and was clearly intended to generate headlines about the SEC and State cases that would be prejudicial to Mr. Quiros.

When the SEC’s complaint was unsealed, the State held a nearly hour-long press conference led by Governor Shumlin, Department of Financial Regulation Commissioner Susan Donegan, Attorney General William Sorrell and ACCD Secretary Moulton to announce its charges against Mr. Quiros and Mr. Stenger. In his prepared remarks, Shumlin took credit for the State’s case but avoided any discussion of his prominent role in, *inter alia*, promoting and soliciting investors for the AnC Vermont and Jay Peak Projects.⁶ Sorrell suggested the case was worse than a “simple bank robbery” and, like the SEC, characterized the complaint as alleging a “massive and complex fraudulent enterprise.”⁷ Following the prepared remarks, Shumlin and the other state officials responded to questions from the media, including a question concerning Shumlin’s and

⁶ *Vermont Digger, Officials: Quiros and Stenger Diverted \$200 Million from EB-5 Investors*, YOUTUBE (Apr. 14, 2016), <https://www.youtube.com/watch?v=JXXrNtjq8Pc> at 37:26 – 41:27.

⁷ *Id.* at 21:50 – 22:04.

other state officials' involvement in soliciting investors.⁸ Shumlin responded generally that “[W]e all feel betrayed” and that “[I]t’s a dark day for Vermont.”⁹

That same day, April 4, 2016, Senator Leahy’s office issued a press release about the case that stated that “I’m shocked and saddened by what state and federal investigators have found” and that “[f]raud and abuse cannot be tolerated.” (Levine Decl. Ex. 60 at 1-2.) Like Governor Shumlin and the other officials at the State’s press conference, Senator Leahy omitted mention of his significant role in the Jay Peak and AnC Vermont Projects and took no responsibility for his own conduct.

2. The Prejudicial Fallout from the SEC’s and the State’s Conduct

The SEC release and State press conference resulted in a media frenzy. In the five days following these press events, the Vermont local media published dozens of articles concerning the cases. (See, e.g., Levine Decl. Ex. 63 (*Times Argus*); Ex. 64 (*Caledonian Record*); Ex. 67 (*Burlington Free Press*); Ex. 68 (*St. Albans Messenger*).) Local television and radio news shows also ran multiple stories about the case. (See Levine Decl. Ex. 65.)¹⁰ Dozens of stories during the month of April alone echoed the SEC’s and State’s hyperbole, referring to Mr. Quiros’s conduct as a “Ponzi” scheme, a “massive” fraud or both. (See, e.g., Levine Decl. Ex. 73 at 2 (*Caledonian Record*) (“[S]tate and federal officials detailed a ‘massive eight-year fraudulent scheme’ by Quiros

⁸ *Id.* at 37:26 – 37:35.

⁹ *Id.* at 38:21 – 38:26.

¹⁰ See also, e.g., John Dillon, *Feds Charge Northeast Kingdom Developers with ‘Ponzi-Like’ Fraud*, VERMONT PUBLIC RADIO (Apr. 14, 2016), <https://www.vpr.org/post/feds-charge-northeast-kingdom-developers-ponzi-fraud>; Stenger, *Quiros Allegations Leave Newport Residents Feeling Betrayed*, MY NBC 5 (Apr. 21, 2016), <https://www.mynbc5.com/article/stenger-quiros-allegations-leave-newport-residents-feeling-betrayed/3021858> (not available for download).

and Stenger that . . . was effectively a \$350 million Ponzi scheme.”); Ex. 82 at 1 (*Times Argus*) (noting investigators’ claims that “a large portion of \$350 million in foreign investment has been squandered in a vast ‘Ponzi-like’ scheme”; Ex. 72 at 1 (*Burlington Free Press*) (“The governor, attorney general and others held a news conference to outline what they called a massive fraud, a Ponzi-like scheme.”); Ex. 62 at 3 (*Vermont Public Radio*) (reporting that Shumlin claimed his EB-5 oversight reforms “uncovered their fraud”).)

Even though the SEC and State had not proven any of their allegations, the local media, by and large, assumed the allegations to be true and convicted Mr. Quiros and Mr. Stenger without a trial. (See, e.g., Levine Decl. Ex. 90 at 1 (*Times Argus*) (commenting that Governors Douglas and Shumlin “were duped, along with everyone else, and it’s important to remember that the blame rests primarily on the perpetrators of the scheme”); Ex. 93 (*Seven Days*) (noting that WCAX-TV had branded the case as “Kingdom Con”).) The articles particularly vilified Mr. Quiros, the only non-Vermonter named as a defendant in the lawsuits. For example, the *Rutland Herald* published an April 24, 2016 opinion piece titled “An end to innocence in Vermont,” that stated:

I must admit, before reading the federal complaint against Bill Stenger and Ariel Quiros – the two principals in the EB-5 fraud scandal that has rocked the state – I convinced myself these types of schemes, rooted in massive greed and deception, had state borders; that Vermont was somehow immune to this kind of behavior. So when I finally sat down and began to read the 82-page federal complaint, I was looking for a reason to believe it wasn’t true. ***Perhaps the fact that Bill Stenger is a Vermonter and Quiros is not gave me hope that somehow the Vermonter was duped – just a pawn in an illegal scheme he had no knowledge of.***

(Levine Decl. Ex. 89 at 1 (emphasis added).) Similarly, in a commentary by Senator Leahy, published by the *Vermont Digger* on April 21, 2016, Senator Leahy blamed the fact that the EB-5 program had “become mired in fraud and abuse” on “mega developers in the most affluent cities”—a clear reference to Mr. Quiros, who is based in Miami. (Levine Decl. Ex. 88 at 1-2.)

Based on the SEC and State's comments to the press, Mr. Quiros was deemed "Guilty Until Proven Innocent." (See Levine Decl. Ex. 92 (*Caledonian Record*) (commenting on the press coverage in an editorial).) Very few media outlets acknowledged the other side of the story. Those that did, commented, for example, that the supposedly "ill-gotten gains" may have been "lawful fees" to which the developers were entitled and that Mr. Quiros had made significant investments and achieved lasting results "in an area not historically known as a growth market." (Levine Decl. Ex. 86 at 1 (*Caledonian Record*)). The *Caledonian Record*'s editorial board also aptly captured the public impact of the SEC's incendiary comments about the fraud allegations in its lawsuit:

The feds called it a "massive fraud" and painted Quiros and Stenger as really terrible actors. ***Online chatter suggests the populist masses are ready to take up their pitchforks. That, of course, is what the press-conference was intended to accomplish.***

(*Id.* at 1 (emphasis added).) The *Caledonian Record* further opined:

The state and federal government certainly seem to think Quiros and Stenger acted badly. The feds threw their full weight at the duo; devoted untold thousands of man-hours investigating them; outlined a case against them in an unchallenged civil complaint; and ***ruined them with a single press conference.*** Then they dispatched a small army to descend on private operations in Jay and Burke, changed the locks, froze assets, and seized private property. ***Neither Stenger nor Quiros, meanwhile, have gotten a single opportunity to defend themselves against the claims. . . .*** So much for due process.

(Levine Decl. Ex. 92 at 1 (emphasis added).)

Examples of "online chatter" from *Vermont Public Radio*'s listeners posted on its website bear out the *Caledonian Record* concern about potential jurors "tak[ing] up their pitchforks":

- And neither of them is facing any jail time... Rob a bank and it's 20 years, steal hundreds of millions and it's a fine.
- Reading this story made me sick to my stomach. How is it that these men who willfully defrauded not only their investors, but the people of Vermont out of potential jobs, will not see any jail time for their actions? If I were to steal \$1,000 worth of cash or merchandise from a convenience store, I'd go to jail for it - or at least get a felony conviction, a fine and community service. But what this article seems to be saying is if I steal tens of millions

of dollars from investors to pay off my personal debts and buy expensive toys, then I get to go free? And what about the people who live in Newport? I believe I've seen the "big hole" in the middle of their downtown. Are they going to simply have to live with that eyesore until all this gets sorted out in court? Just another example of the two-tiered justice system in this country...

- They'll go to prison . . . maybe not as fast as we would like. It will take time to bring the criminal case. Securities fraud is federal felony and there will be other charges.
- You mean like all those Wall Street bankers that destroyed the economy... Oh wait.
- So was the intention to operate this entire NEK EB-5 project as a ponzi scheme from the outset? Who and where was the kernel around which the financial web coalesced? Throughout the article Quiros is mentioned most prominently as the big, bad perpetrator, but what role ("facilitator") did Stenger play?
- Is this not a crime? Is this any different than Bernie Madoff's ponzi scheme?

(Levine Decl. Ex. 62 at 8-10.)

Because the SEC and State press events occurred during a gubernatorial election year, Vermont's candidates for governor took up pitchforks, too. (*See, e.g.*, Levine Decl. Ex. 78.) In addition to accusing Mr. Quiros of fraud, candidates also accused him of corruption based on his donations to Shumlin and the Vermont Democratic Party. (*See id.* at 1; *see also* Levine Decl. Ex. 85.) For example, candidate Peter Galbraith stated during a speech that "[t]here is no excuse for allowing wealthy individuals [referring to Mr. Quiros] to corrupt our politics by using corporate entities to evade Vermont's limits on campaign contributions." (Levine Decl. Ex. 85.) The media frenzy over allegations of corruption was further enflamed by revelations that, several weeks before his press conference accusing Mr. Quiros, Governor Shumlin had requested the destruction of five former staffers' emails, including those of Alexandra MacLean. (Levine Decl. Ex. 83; *see also* Exs. 76, 78, 79 & 87.) Significantly, MacLean was Governor Shumlin's campaign manager

and Deputy Chief of Staff and went to work for the Jay Peak Projects after leaving the Governor's staff. (Levine Decl. Ex. 83.) She appears on the Government's Preliminary Witness List.

Numerous articles also painted Vermonters as victims of the alleged scheme even though there were no allegations in the SEC or State complaints to that effect. Just days after the allegations were announced, the *Times Argus* published an editorial entitled "Violation of trust" that characterized Mr. Quiros and Mr. Stenger as "greedy people" and "scoundrels intent on making their millions by abusing the public trust" and likened their connection to Shumlin and Leahy to the "unholy alliance between Lyndon Johnson and the business that became Haliburton." (Levine Decl. Ex. 82 at 1.) It also asserted that "the people of the Northeast Kingdom are also victims – people who trusted and pinned their hopes on Stenger's ambitious ventures." (*Id.* at 2.) The *St. Albans Messenger* ran a piece that seized on Shumlin's suggestion of "betrayal" and, numbering contractors and people at risk of losing their jobs among Mr. Quiros's and Mr. Stenger's victims, states that the SEC's unproven allegations had "happened because we trusted the project and the people behind it." (Levine Decl. Ex. 81 at 1.) The end of the story noted that Mr. Quiros and Mr. Stenger had yet to tell "their side," before speculating immediately thereafter that the SEC's seizure of Mr. Quiros's assets "impl[ied] perhaps that Mr. Quiros gained personally and Mr. Stenger did not." (*Id.* at 2.)

Multiple stories also cast blame on Mr. Quiros for "the hole" in downtown Newport, which was the site of the planned construction of a future EB-5 project known as the "Renaissance Block." (See, e.g., Levine Decl. Exs. 71, 77, 80, 109 & 117.) Prior to announcing this future EB-5 project, the "Renaissance Block" was known as the "Spates Block" and was comprised of "a hodge-podge of marginal businesses and empty storefronts left by failed businesses." (Levine Decl. Ex. 30 at 2; *see also*, e.g., Levine Decl. Ex. 35 at 1 (referring to the property as "the

dilapidated Spates Block"); Ex. 50.) After Mr. Quiros and Mr. Stenger purchased the Renaissance Block, Newport city officials requested that they demolish the "old and decrepit block of buildings" at that location to prevent them from becoming "fire and safety hazards." (Levine Decl. Ex. 71 at 1.)

The Renaissance Block was not referenced in the SEC or State complaints, and there was no wrongful conduct alleged in connection with this potential future EB-5 project. Nevertheless, the press turned the Renaissance Block into the symbol of the alleged fraud schemes. An opinion piece by a former Douglas administration official published approximately ten days after the SEC and State press events blamed Mr. Quiros and Mr. Stenger for Newport's "massive hole in the ground in its downtown because buildings were torn down to make room for facilities that are likely never going to be built." (Levine Decl. Ex. 89 at 1.) In May 2016, the *Schenectady Daily Gazette* published a story entitled "\$850M dream a nightmare for Vermont town. Pair accused of perpetuating biggest fraud in state's history":

NEWPORT, Vt. – Jo-Ann Brooks grimaced as she looked out the window of her jewelry store in this tiny town in northern Vermont, near the Canadian border. Across Main Street, an entire block of shops and apartments was razed more than a year ago in the expectation of a new "renaissance" development that has yet to materialize. In its place is a gaping hole, with old concrete cellars.

"We call it Little Beirut," Brooks said. "It looks like it was bombed."

The hole is a visual monument to the failed plans of two ambitious businessmen who vowed to revitalize this struggling region, known as the Northeast Kingdom. With an \$850 million dream, they promised the biggest economic development in Vermont history. They planned to finance it through a federal program that allows wealthy foreign citizens to invest \$500,000 in projects in distressed areas in return for green cards, leading to permanent residency in the United States.

Instead, the two have been accused of perpetrating the biggest fraud in Vermont history – as well as in the history of that federal visa program, known as EB-5.

The businessmen, Ariel Quiros and William Stenger, raised \$350 million through the EB-5 program from hundreds of foreign investors from at least 74 countries. The money was intended for an array of projects, including a ski resort, hotels and

a biotech research firm. Instead, according to a 52-count civil complaint filed last month by the U.S. Securities and Exchange Commission and a 15-count civil complaint filed by the state of Vermont, they engineered a “massive eight-year fraudulent scheme” in which they “systematically looted” millions of dollars out of the foreign investors.

The complaints said the two used a “Ponzi-like” scheme to divert \$200 million intended for future projects into a dizzying swirl of fraudulent accounts set up to try to keep earlier projects afloat. Some were completed, others were not. In addition, Quiros was accused of siphoning off \$50 million for his personal use, which included buying a luxury condominium in Trump Place New York.

The SEC said the two left a trail of debt. Their actions have jeopardized the immigration status of their investors, who are already in the United States, and have thrown into doubt the future of the visa program. And they have left the promise of a revitalized Newport unfulfilled, having failed to rebuild the “renaissance” block on Main Street, the biotech firm and a hotel, marina and conference center.

Beyond that, the state’s top officials, including Sens. Patrick J. Leahy and Bernie Sanders and Gov. Peter Shumlin, all of whom supported and promoted the program, have said they felt betrayed.

(Levine Decl. Ex. 95 at 1.)

3. The Prejudicial Publicity Has Not Abated

The publicity concerning Mr. Quiros and the SEC allegations did not abate following the filing of the lawsuits. The media has extensively covered the SEC and State cases as well as the administration of the projects taken over by the Receiver. (See, e.g., Levine Decl. Ex. 97 at 1 (*Burlington Free Press*) (reporting in July 2016 that “Raymond James has agreed” to settle with the State “for violations of securities laws by Jay Peak principals Bill Stenger and Ariel Quiros through a Miami branch office of Raymond James”); Ex. 105 at 1 (*Vermont Digger*) (reporting in September 2016 that Mr. Stenger agreed to settle with the SEC for “allegedly aid[ing] and abet[ting] his business partner, Ariel Quiros, in a ‘Ponzi-like’ scheme”); Ex. 121 at 1 (*Caledonian Record*) (August 2017 report on court approval for a Burke Mountain business arrangement advanced by the “federal receiver in charge of the assets of accused Ponzi-like scheme mastermind Ariel Quiros”)). Moreover, multiple local media outlets established pages on their websites

devoted to aggregating and promoting their coverage of the SEC and State allegations with links to stories that they published or aired about the case.¹¹ Journalists from Vermont news organizations ranked the “EB-5 SCANDAL” in which “[d]evelopers Quiros and Bill Stenger were accused of misusing in ‘Ponzi-like fashion’ more than \$200 million raised from foreign investors” as the third top story of 2016. (Levine Decl. Ex. 110 at 1.) The *Rutland Herald* included the case against Mr. Quiros as one of its top stories for 2016, dubbing it “Fraud frenzy.” (Levine Decl. Ex. 112 at 2.) And the internet news outlet the *Vermont Digger* has acknowledged the key role of its reporting on the case against Mr. Quiros in increasing its average monthly users from roughly 110,000 at the beginning of 2014 to nearly 270,000 by 2017. (Levine Decl. Ex. 136 at 13 (quoting *Vermont Digger* board member Cain Pratt as saying that “EB-5 put Digger in the minds of people”).)

The local Vermont television stations also covered the case extensively. For example, WCAX-TV ran dozens of stories about the case on its news programs and its website, routinely referring to it as “Kingdom Con” and the “largest fraud case in Vermont’s history.”¹² Some of

¹¹ See VERMONT DIGGER, <https://vtidigger.org/eb5-an-investigation/> (webpage dedicated to EB-5 investigation coverage); BURLINGTON FREE PRESS, <https://www.burlingtonfreepress.com/topic/e7b85534-67f5-44d3-9a1f-ecd7464be71d/eb-5-in-vermont/> (same); CALEDONIAN RECORD, https://www.aledonianrecord.com/news/eb/collection_dbe5c36a-0e24-11e6-a4ad-f722f3c476bd.html (same); VERMONT PUBLIC RADIO, <https://www.vpr.org/term/eb-5#stream/0> (same).

¹² See, e.g., YCQM Feb. 10, 2019, WCAX-TV (Feb. 10, 2012), <https://www.wcax.com/content/news/YCQM-Feb-10-2019-505639701.html> at 01:04 – 01:09 (Part I); Vermont Announces EB-5 Settlement, WCAX-TV (July 12, 2018), <https://www.wcax.com/content/news/Scott-Donovan-to-make-EB-5-announcement-in-Newport-488011591.html> at 00:00 – 00:02; Is the State of Vermont Responsible for the Alleged Kingdom Con?, WCAX-TV (May 21, 2019), <https://www.wcax.com/video?vid=477322593> at 00:00 – 00:09; Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History, WCAX-

these stories referred to Mr. Quiros as “the man at the center of the Kingdom Con” or “the man at the heart of the EB-5 Kingdom Con case.” (Levine Decl. Exs. 162 & 163.) NBC5, based in Plattsburgh, New York, ran multiple stories that presented the State’s version of the events. In one story showing video of the demolished Renaissance Block, an unseen reporter commented that “the gaping hole in the center of downtown Newport looks and feels like *betrayal* to many in Vermont’s Northeast Kingdom,” appropriating the inflammatory language that Shumlin used at his April 2016 press conference.¹³ The broadcast news report follows its video footage of a local resident stating that “it kind of feels like the rug’s been pulled out under all of our feet” with video footage of Mr. Quiros and Mr. Stenger, who the reporter states “promised to redevelop [the Renaissance] block.”¹⁴ Another resident states that they “left us with a big hole in our town. So it’s pretty crappy.”¹⁵ At no point did the NBC5 report tell viewers or readers that the Renaissance Block was not even part of the SEC’s or the State’s allegations. The report also adopts the prejudicial “Ponzi-like” scheme language from the SEC press release and states that the SEC has accused Mr. Quiros of being the “mastermind” of the scheme.¹⁶

In addition to reporting on case developments, more and more articles personally attacked Mr. Quiros. For example:

- In April 2016, a *Green Mountain Daily* editorial compared this case to a “twenty-year Ponzi scheme” involving NSYNC’s manager, and stating “Now, thanks to a simple twist

TV (May 21, 2019) <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html> at 00:00 – 00:07.

¹³ *Stenger, Quiros Allegations Leave Newport Residents Feeling Betrayed*, *supra* n.10 <https://www.mynbc5.com/article/stenger-quiros-allegations-leave-newport-residents-feeling-betrayed/3021858> at 00:09 – 00:15 (not available for download).

¹⁴ *Id.* at 00:18 – 00:29.

¹⁵ *Id.* at 00:59 – 01:02.

¹⁶ *Id.* at 00:40 – 00:50.

of fate, the SEC (and indirectly to Carlo “Charles” Ponzi), Bill Stenger and Ariel Quiros share more with NSYNC’s Justin Timberlake than ever dreamed possible.” (Levine Decl. Ex. 66 at 1.)

- A May 12, 2016 *St. Albans Messenger* piece entitled “Jay Peak and lost trust” that noted that the “story” regarding Mr. Quiros has “been dubbed ‘Kingdom Con,’” which referred to Mr. Quiros as “a mystery man” and quoted a *Vermont Business Magazine* op-ed by Mike Smith, former secretary of administration and secretary of human services under Governor Jim Douglas, entitled “An end to innocence in Vermont”: “What is perhaps the greatest tragedy of this entire episode is the discovery that the confidence we had in our state’s immunity from the greed and deceit common elsewhere was probably never legitimate in the first place. It was just an illusion-a wish for how we would like Vermont to be.” (Levine Decl. Ex. 96 at 1-2.)
- In April 2017, the *Caledonian Record* published an article that noted that “authorities were clear that it was Quiros who was the alleged mastermind of the ‘Ponzi-like scheme’” and reported on an interview with Department of Financial Regulation Commissioner Michael Pieciak in which Mr. Pieciak compared Mr. Quiros to Bernie Madoff. (Levine Decl. Ex. 115 at 1-3.)
- In May 2017, both the *Rutland Herald* and the *Times Argus* published an editorial entitled “Fatal taint” that began by observing that “[t]he biggest financial scandal in Vermont history occurred when the owners of Jay Peak resort and other properties employed a federal visa-selling program to concoct a mammoth Ponzi scheme,” and accused Mr. Quiros and Mr. Stenger of playing Vermonters for “chumps,” and likened them to Jared Kushner’s sister, who also was involved in the program. (Levine Decl. Ex. 118 at 1; Ex. 127 at 1.)
- In August 2017, both the *Times Argus* and the *Rutland Herald* published an editorial about the AnC Vermont project entitled “The biggest fraud” that characterized Mr. Quiros and Mr. Stenger as “shady operators,” compared the AnC Vermont project to a Trump family EB-5 project, and accused Mr. Quiros and Mr. Stenger of “[m]aking off with money from foreign investors,” as well as “stealing the hopes of Vermonters who had seen glimmers of a renaissance for a region that could use it.” (Levine Decl. Ex. 122 at 2; Ex. 123 at 2-3.)
- In September 2017, *Seven Days* published an editorial under a picture of Mr. Quiros, Mr. Stenger, and Mr. Kelly posing with state officials that characterized “Vermont’s EB-5 scandal” as “the biggest fraud scheme in state history and in the 25 years of the federal EB-5 program” (Levine Decl. Ex. 124 at 1.)
- In March 2018, the *Caledonian Record* published a letter to the editor opining that Mr. Quiros and his partners were “thieves” and that Mr. Quiros “should be in jail for quite sometime [sic]” but that he would not do jail time because “he is loaded.” (Levine Decl. Ex. 134 at 1.)

In a *Deeper Dig* podcast, broadcast shortly after the Indictment was returned in this case, the *Vermont Digger*'s Anne Galloway stated: “*Quiros has been kind of blamed as the mastermind and you know, the real evil one*, who was behind the scenes making all this happen.” (See Levine Decl. Ex. 154 at 4 (transcript) (emphasis added).)¹⁷

4. State Officials Make Multiple Additional Statements to the Press that Generate Prejudicial Publicity

Federal and state officials added to the prejudicial publicity by making repeated inflammatory statements, many of which condemned Mr. Quiros. A sample of these statements is set forth below.

a. *Commissioner Pieciak's April 2017 Interview with the Caledonian Record*

In April 2017, Department of Financial Regulation Commissioner Michael Pieciak, who is listed on the Government's Preliminary Witness List, gave an interview to the *Caledonian Record* during which he “reviewed the entire case” and shared “pieces of the puzzle that ha[d] not previously been on the record.” (Levine Decl. Ex. 115 at 2.) The *Caledonian Record* reported Pieciak's statements in a two-part series taking a look at the scandal. (*Id.*; Levine Decl. Ex. 116.) Notably, Pieciak agreed to this interview at the same time that the State was resisting the media's requests for public records related to the State's role in the Jay Peak and AnC Vermont Projects. (See, e.g., Levine Decl. Ex. 113 at 1 (Feb. 11, 2017 *Rutland Herald* opinion piece stating that “[t]he Vermont attorney general's office still refuses to release” state officials' emails related to the EB-5 program); Ex. 114 at 1 (March 14, 2017 report that the “Scott administration will

¹⁷ See also Anne Galloway, *The Deeper Dig: From Biotech ‘Dream’ to Federal Court*, VERNMONT DIGGER (June 3, 2019), <https://vtidigger.org/2019/06/03/deeper-dig-biotech-dream-federal-court/> at 06:40 – 06:48.

‘expedite’ release of records pertaining to EB-5 projects”); Ex. 126 at 1 (January 14, 2018 report that the “Vermont Attorney General’s office recently asked the court to extend the deadline” for producing the documents)).

Among other things, Pieciak described a meeting that he had with lawyers for Mr. Quiros in January 2015. (Levine Decl. Ex. 115 at 3.) According to Pieciak, in response to the Department’s questions about how Mr. Quiros could pay back investors if certain approvals were not received, Mr. Quiros’s lawyers “‘sort of had smiles on their faces’ . . . and one said, ‘Mr. Quiros is a man of untold wealth.’” (*Id.*) Pieciak then told the reporters that “[i]t was the same sort of response somebody would have given if you were sort of a Bernie Madoff or someone else who has this perception of power and wealth.” (*Id.*) Pieciak then suggested that Mr. Quiros had fooled his lawyers, stating that “I think even they bought into this perception that Quiros was this wealthy, successful businessperson, when in reality from day one, they diverted tens of millions of dollars to buy the resort and what that shows you is they didn’t have the money, they didn’t have tens of millions of dollars he said he was going to have.”” (*Id.*)

Pieciak also made various other prejudicial statements to the *Caledonian Record* reporters without presenting Mr. Quiros’s version of the events. For example, Pieciak stated that Mr. Quiros bought two condos “right during the prime time of the fraud.” (Levine Decl. Ex. 116 at 1.) According to the article, Pieciak added that “when he looked up the condos to see where they were, that when ‘Trump Place showed up in the Google search, I knew this was a perfect encapsulation of what happened,’” and that “‘When you’re doing that for your family, and that ultimate source is other people’s monies they’ve entrusted you with, it’s obviously not legal.’” (*Id.*)

b. The SEC’s Settlement of its Civil Case with Mr. Quiros

In February 2018, the SEC and Mr. Quiros agreed to a settlement that resolved its case against him. Mr. Quiros admitted no wrongdoing as part of the settlement, but the SEC’s press

release publicly announcing the settlement buried that fact in the last sentence of the second to last paragraph. (Levine Decl. Ex. 128.) The SEC opened this release with the following headline-grabbing sentence: “The Securities and Exchange Commission today announced that the Miami-based businessman behind an alleged scheme involving investments in a Vermont-based ski resort has agreed to pay back more than \$81 million of investor money that he used illegally.” (*Id.* at 1.) Prior to acknowledging Mr. Quiros’s non-admission, the SEC release also included a series of prejudicial quotes about the case, including a quote from its Co-Director of the Enforcement Division that stated: “‘The SEC’s emergency action halted an alleged massive fraud that Jay Peak, Quiros, and Stenger perpetrated on more than 700 investors from at least 74 countries.’” (*Id.* at 1-2) Local media outlets reported on the SEC’s settlement without noting that Mr. Quiros made no admission of wrongdoing.¹⁸

c. The State’s Settlement of its Civil Case with Mr. Quiros

In July 2018, Mr. Quiros reached an agreement in principle to settle the civil suit that the State of Vermont filed against him alleging that he and others defrauded EB-5 investors. (*See* Levine Decl. Ex. 139.) Under the terms of the settlement, Mr. Quiros did not admit any wrongdoing and agreed to pay the State of Vermont \$2 million in satisfaction of all claims that the State asserted or could have asserted against him. (Levine Decl. Ex. 138.) Mr. Quiros paid this fine through the transfer to the State of five properties that he owned in the Northeast Kingdom that were unrelated to any of the State’s allegations. (*Id.*) Despite the fact that the civil suit solely alleged that foreign EB-5 investors were the only victims of the charged offenses (*Vermont v.*

¹⁸ See, e.g., *Businessman in Jay Peak Fraud Case Agrees to Pay Back \$81M*, MY NBC 5 (Feb. 2, 2018), <https://www.mynbc5.com/article/businessman-in-jay-peak-fraud-case-agrees-to-pay-back-dollar81m/16025442> (not available for download).

Quiros, et al., No. 217-4-16 Wncv (Apr. 14, 2016) Compl. ¶ 2 (alleging that “[t]he victims of this fraud are foreign nationals seeking residency in the United States through the EB-5 Program”)), the State did not use any of the settlement funds to recompense the alleged victims. Rather, the State used the funds “for economic development in the Northeast Kingdom.” (Levine Decl. Ex. 138 at 2.)

During an approximately fourteen-minute press conference announcing the settlement, none of the State officials mentioned the alleged victim investors even once.¹⁹ Rather, in a series of misleading statements, State officials suggested that the victims of the charged State lawsuit included the people of the State of Vermont and the contractors and workers on Mr. Quiros’s EB-5 projects. For example, in prepared remarks, Attorney General Donovan falsely attributed “harm” done to Newport to the conduct alleged in the lawsuit, stating:

We’re repairing the harm done to the City of Newport – we’re taking the small step towards that direction – to the Northeast Kingdom. . . . We hope that by closing this chapter today, by getting some money to this great city, that it will continue its work towards a brighter future to revitalizing this city, to revitalizing the Kingdom and restoring the harm done to so many community members and restoring the public trust in our state government.²⁰

Governor Scott went even further suggesting that Mr. Quiros was responsible for a “dark cloud” over Vermonters and falsely adding contractors on the EB-5 projects and Jay Peak employees to the list of victims, without mentioning that no such allegations were contained in the State’s lawsuit:

It allows us to move forward with a considerable amount of money for the Northeast Kingdom and impacted communities. With over 2 million dollars the State will receive in this settlement – which again comes through the Ariel Quiros remaining Vermont properties and payments from Bill Stenger over the next five

¹⁹ *Newport Dispatch, Vermont Settles with Stenger and Quiros*, YOUTUBE (July 12, 2018), <https://www.youtube.com/watch?v=CITMvTkU1-0>.

²⁰ *Id.* at 03:21 – 04:44.

years, we will be able to help the Northeast Kingdom and the Newport region in particular with much needed funding for economic development. . . .

Today's announcement represents a major step forward for the entire State as we continue to recover from the actions of the Jay Peak defendants. I want to recognize the tremendous efforts of the hardworking contractors who built the EB-5 projects across the region and who stuck with us until they were able to be paid in full for their work. I also want to thank the hundreds of employees at Jay Peak and Burke who similarly hung with us even on the darkest days of the fraud and now have secure employment at much improved resorts. . . . While our work is not yet completed, the dark cloud that has been hanging over us for the last few years is beginning to lift, and I am confident that better days are ahead for this region.²¹

Significantly, neither Scott nor Donovan mentioned that Mr. Quiros did not admit any wrongdoing as part of the settlement.²² To the contrary, Donovan misleadingly left Vermonters with the opposite impression. Approximately five months prior to the conference announcing the State settlement, Donovan criticized the SEC in a videotaped interview for resolving its lawsuit against Mr. Quiros without requiring an admission of wrongdoing:

We want to turn the chapter on this episode, but before we do that I think there's got to be accountability. What you have to note, Stewart [the reporter], in the SEC case, is this was a no admit, no deny resolution. ***I think accountability here is some form of admission.***²³

In his prepared remarks concerning the State settlement, Donovan stated that he “believe[d] these settlements satisf[y] the principles of ***accountability***, transparency, repairing the harm done to the City of Newport and [the] Northeast Kingdom and restoring the public trust that this scandal has

²¹ *Id.* at 05:16 – 08:21.

²² *See id.*

²³ *VT AG: Ariel Quiros Should Acknowledge Role in EB-5 Fraud*, MY NBC 5 (Feb. 5, 2018), <https://www.mynbc5.com/article/vt-ag-says-quiros-should-acknowledge-role-in-eb-5-fraud/16628478> at 00:35 – 00:51 (emphasis added) (not available for download).

done to our state.”²⁴ Based on his prior statement equating “accountability” with an admission of wrongdoing, Donovan’s remarks were crafted to mislead the public concerning Mr. Quiros’s non-admission of any wrongdoing in the State settlement.

State Auditor Douglas Hoffer also spoke at the press conference.²⁵ According to the State’s press release announcing the settlement, Donovan asked Hoffer “to perform an audit of the State’s involvement with the EB-5 projects at Jay Peak,” which, according to Donovan, “will allow us to address the loss of trust in state government that has resulted from this fraud.” (Levine Decl. Ex. 138 at 1.) In other words, the Attorney General’s Office filed its civil suit without any investigation into the role of State employees in the Jay Peak and AnC Vermont Projects and has delegated that responsibility to Hoffer post-settlement.

The announced audit generated substantial additional publicity up through the filing of this motion. For example, in running for reelection in late 2018, Donovan cited to this audit to deflect criticism he received for his office’s lack of transparency with respect to “the EB-5 scandal.” (Levine Decl. Ex. 129 at 3.) In September 2019, Donovan asked Hoffer to postpone the audit indefinitely until this case has concluded, stating “You’ve got to let prosecutors go first, the criminal charge goes first . . . When you want to talk to people and prepare your case, you don’t want three different statements, you want one statement. . . . It’s protecting the prosecution and it’s protecting the case.” (Levine Decl. Ex. 137 at 1.)

²⁴ *Vermont Announces EB-5 Settlement*, *supra* n.12, <https://www.wcax.com/content/news/Scott-Donovan-to-make-EB-5-announcement-in-Newport-488011591.html> at 01:11 – 01:26 (emphasis added).

²⁵ *Vermont Settles with Stenger and Quiros*, *supra* n.19, <https://www.youtube.com/watch?v=CITMvTkU1-0> at 08:27 – 08:59.

5. The United States Attorney's Office Fans the Flames with False and Misleading Press Statements

Notwithstanding the extensive publicity that the AnC Vermont Project and the litigations against Mr. Quiros received by the time the Government unsealed the Indictment in this case, United States Attorney Nolan decided to hold an offsite press conference in Newport to announce the charges in this case.²⁶ Nolan did not hold the press conference at the planned site of the building for the AnC Vermont Project, which is the focus of the Indictment. Instead, she held it in front of “the hole,” which is, at best, tangentially related to the charged offenses.²⁷ In fact, the only reference to the location of “the hole” in the Indictment is an allegation that \$250,000 in AnC Vermont Project administrative fees was used to make an initial payment on the purchase of the Spates Block. (Indictment ¶ 43.)

When asked during the press conference by a reporter “why are we in front of the hole,” Nolan stated:

It’s very important to me that the U.S. Attorney’s Office have a presence outside of Chittenden County and make sure that all communities across the State know that we are here for them, and we’re fighting for justice for them. We thought it was important to do this in the place in Vermont that was most shook, most rocked, most affected by this fraud. We wanted to – the easiest place to do it is a public place, but more than that, the Indictment– this piece of property actually is related to the allegations the grand jury has returned. Specifically, the grand jury indictment alleges that \$250,000 of AnC investor funds paid in the form of administrative fees were used as an initial down payment on this property, the Spates Block, which was to be – which the defendants planned to use to construct a future EB-5 project. So part of their misuse of funds involved the purchase of – or at least the down payment improperly with AnC investor funds on this block.²⁸

²⁶ *Vermont Digger, U.S. Attorney Announces Criminal Charges in EB-5*, YOUTUBE (May 23, 2019), <https://www.youtube.com/watch?v=68xdslvtM6E>.

²⁷ *See id.*

²⁸ *Id.* at 14:52 – 16:04.

Nolan's suggestion that "the hole" was "the place in Vermont that was most shook, most rocked, most affected by this fraud" is false and misleading for multiple reasons. Nolan's remarks encouraged the people of Vermont to think of themselves as having been victimized and defrauded even though not a single Vermonter, let alone any Newport resident, is alleged to be a victim of the scheme charged in the Indictment. Rather, the only alleged victims of the charged fraud scheme are foreign investors in the AnC Vermont Project. Moreover, Nolan's decision to hold the press conference at "the hole," which had already received so much inflammatory publicity incorrectly linking it to the SEC's and State's fraud allegations, served no purpose other than to maximize inflammatory coverage of the case by stoking and appealing to her audience's outrage. Notably, notwithstanding her emotive characterization of "the hole" as "the place in Vermont that was most shook, most rocked, most affected by this fraud,"²⁹ Nolan was unable to answer questions from a reporter about the identity of the owner of the Renaissance Block property and who would be the owner when the case is done. In response, Nolan tellingly admitted that: "I don't have that information for you at this time. I actually would have to look into that. I don't have the answer. *What I have for you is information about the criminal charges.*"³⁰ The emphasized statement admits the lack of relationship between "the hole" and the criminal charges.

In addition, Nolan issued a press release which again falsely linked the fraud allegations to "the hole." (Levine Decl. Ex. 151.) The press release included the following quote from FBI Special Agent-in-Charge James N. Hendricks:

This case is about greed and deceit. The fraud alleged in this indictment and the related fraud alleged by the SEC and the State of Vermont have affected many Vermonters. . . . The defendants' broken business promises have left not only *a physical scar on the city of Newport*, but also an intangible scar on the promise of

²⁹ *Id.* at 15:12 – 15:18.

³⁰ *Id.* at 20:14 – 20:23 (emphasis added).

economic development for the Northeast Kingdom and on the dreams of many hopeful immigrants. By seeking to hold accountable those who break the law and cause such harm, we hope to help to heal these scars.

(*Id.* at 1-2 (emphasis added).) The “physical scar” was clearly a reference to “the hole.”

United States Attorney Nolan’s inappropriate conduct in issuing these false and misleading statements had its desired effect. There were multiple stories written following her press conference and release linking Mr. Quiros to the “hole,” the “pit,” the “scar” in downtown Newport. (*See, e.g.*, Levine Decl. Ex. 150.)³¹ For example, WCAX-TV’s story about the “Kingdom Con Federal Charges” that aired during multiple newscasts incorrectly linked the charges to the “hole here in the heart of downtown Newport.”³² During the broadcast story, WCAX-TV’s reporter, while standing at the same location where the United States Attorney held her press conference, stated:

Probably the most visible *scar* of the EB-5 scam involving the developers up at Jay Peak, a hole here in the heart of downtown Newport that was supposed to have been redeveloped as part of this big plan. But federal investigators say it was all a scheme.³³

³¹ *See also, e.g., Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History, supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html>; Liam Elder-Connors, Mark Davis, & Emily Corwin, *EB-5 Development: 4 Named in Criminal Indictment Filed in Federal Court Over NEK Project*, VERNONT PUBLIC RADIO (May 22, 2019), <https://www.vpr.org/post/eb-5-development-4-named-criminal-indictment-filed-federal-court-over-nek-project#stream/0>; Mitch Wertlieb & Matthew Smith, *New From Brave Little State: What’s the Plan for the ‘Pit’ in Newport?*, VERNONT PUBLIC RADIO (July 9, 2019), <https://www.vpr.org/post/new-brave-little-state-whats-plan-pit-newport-0>.

³² *Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History, supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html> at 00:49 – 00:53.

³³ *Id.* at 00:41 – 00:53 (emphasis added).

Similarly, an episode of *Brave Little State* that aired on *Vermont Public Radio* on July 5, 2019, entitled “What’s the Plan for the Pit in the Middle of Newport?” stated that “This [Renaissance] block has become sort of a central character in the story of the EB-5 scandal. It’s become the embodiment, like the physical embodiment of the scandal. Like when people talk about the EB-5 scandal, they talk about the hole.”³⁴ This statement was followed with clips of corroborative soundbites from other local newscasts, including “All that’s left of the EB-5 development project is a massive hole in the ground;” “The community was left with a giant hole in the ground;” and “A gaping wound in the center of Newport. A hole.”³⁵ A *Vermont Public Radio* online article promoting this episode stated that “[c]overage of the case rarely fails to mention the ‘giant hole,’ or the ‘massive hole,’ or the ‘gaping wound.’” (Levine Decl. Ex. 157 at 2.)

In addition, *Seven Days* published a cartoon in which a gleeful local citizen is about to murder Mr. Quiros by pushing him into “the hole,” which the cartoon refers to as the “Ariel Quiros ‘Renaissance Block’ Fraud Pit.” (Levine Decl. Ex. 158.) The caption for this cartoon reads: “So what now to do with the pit left after a block of downtown Newport was razed for . . . nothing?” (*Id.*) The gleeful Vermonter is depicted as answering, “Easy . . . we start the backfilling process right now. . . .” as he readies to push Mr. Quiros to his death. (*Id.*)

ARGUMENT

I. MR. QUIROS CANNOT RECEIVE A FAIR TRIAL IN THE DISTRICT OF VERMONT

Mr. Quiros cannot receive a fair trial unless the Court transfers venue for this matter to another District in the Circuit because he has been subjected to pervasive pretrial publicity

³⁴ *Brave Little State*, *supra* n.31, <https://www.vpr.org/post/new-brave-little-state-whats-plan-pit-newport-0> at 03:14 – 03:32.

³⁵ *Id.* at 03:32 – 03:43.

stemming from consistent and continuous vilification by the Vermont media, politicians, and other government officials for three-and-a-half years, up to and including the present. Rule 21(a) provides that “the court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” This rule safeguards one of a criminal defendant’s most fundamental constitutional rights—the right under the Fifth and Sixth Amendments to trial by a fair and impartial jury. *Skilling v. United States*, 561 U.S. 358, 378 (2010) (“‘The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.’”) (alteration in original) (quoting *Patterson v. Colorado ex rel. Attorney Gen. of Colo.*, 202 U.S. 454, 462 (1907) (opinion for the Court by Holmes, J.)); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A Rule 21(a) motion based on prejudicial publicity should be granted if, as in this case, “the community has been so saturated with inflammatory pre-trial publicity that it pervades the proceedings and overrides notions of fairness in the determination of guilt or innocence.” *United States v. Washington*, 813 F. Supp. 269, 271 (D. Vt. 1993). Under such circumstances, the Court should apply a presumption of prejudice and transfer venue pretrial. *Washington*, 813 F. Supp. at 271; *see also United States v. Bakker*, 925 F.2d 728, 732 (4th Cir. 1991).³⁶

³⁶ Where a court determines that a presumption of prejudice does not apply, it should nonetheless transfer venue pursuant to a Rule 21(a) motion if “there is a reasonable likelihood that pretrial publicity will be so prejudicial as to prevent a fair trial.” *Washington*, 813 F. Supp. at 271; *see also Bakker*, 925 F.2d at 732. This evaluation typically occurs during or after *voir dire* examination of potential jurors. *Washington*, 813 F. Supp. at 273. If the Court declines to find a presumption of prejudice here, Mr. Quiros reserves the right to renew his Rule 21(a) motion during or following *voir dire*.

The presumption of prejudice applies here because the coverage of Mr. Quiros in the local media “has been so extensive, pervasive and inflammatory” that he cannot receive a fair trial in this District. *See United States v. Jacques*, 08-CR-117, 2011 WL 1706770, at *5 (D. Vt. May 4, 2011). “Local media publicity is more relevant than national and regional publicity” in determining whether to apply the presumption of prejudice (*id.* at *7), and the Court should distinguish “[i]nherently prejudicial publicity . . . from the mere exposure to adverse publicity.” *Id.* at *6. In addition to the pervasiveness of prejudicial pretrial publicity, courts also consider:

the extent to which the government is responsible for generating the publicity, the extent to which the publicity focuses on the crime rather than on the individual defendants charged with it, and other factors reflecting the likely effect of the publicity on the ability of potential jurors in the district to hear the evidence impartially.

Id. at *5 (internal quotation marks omitted) (quoting *United States v. Sabhnani*, 599 F.3d 215, 232 (2d Cir. 2010) and *United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990)). In Mr. Quiros’s case, the widespread media publicity repeatedly identifying him for years as the “mastermind” of a “Ponzi scheme” that “betrayed” the trust of the people of Vermont—and the Government’s role in perpetuating this narrative—all strongly support adopting a presumption of prejudice.

A. THE PRETRIAL PUBLICITY HAS BEEN SUFFOCATING AND PERSISTENT

There have been well over a thousand print and broadcast stories in the local Vermont media about Mr. Quiros and the EB-5 projects at the heart of the Indictment, hundreds of which discuss allegations relevant to this case or related civil litigations. (*See* Levine Decl. Ex. 1 (listing articles).)³⁷ Every major Vermont print outlet has published a significant number of such articles

³⁷ Levine Decl. Ex. 1 lists print and broadcast media stories that relate to the Jay Peak and AnC Vermont Projects, or the civil and criminal cases relating thereto. It includes (1) articles

that have mentioned Mr. Quiros by name. In fact, since April 14, 2016, when the SEC announced its civil suit against Mr. Quiros with an inflammatory press release accusing Mr. Quiros of having “misappropriated” investor funds in a “Ponzi-like fashion” (Levine Decl. Ex. 74 at 1), nearly every article discussing or referring to allegations relevant to this case has mentioned Mr. Quiros and many have referred to or adopted the SEC’s “Ponzi” characterization (*see, e.g., supra* 20). The *Vermont Digger* has published nearly 300 articles discussing or referring to allegations relevant to this case (*see* Levine Decl. Ex. 1 at pp. 32-46), with nearly all mentioning Mr. Quiros and well over a hundred using or referencing the SEC’s “Ponzi” characterization. Similarly, the *Caledonian Record* published approximately 275 such articles (*see id.* at pp. 17-29), with most mentioning Mr. Quiros and over a hundred using or referencing “Ponzi.” Moreover, the *Burlington Free Press* (approximately 75 such articles), the *Rutland Herald* (approximately 45 articles), the *Times Argus* (approximately 60 articles), *Seven Days* (approximately 40 articles), and the *St. Albans Messenger* (approximately 25 articles), have collectively published hundreds of articles, nearly all of which mention Mr. Quiros by name, and many of which use or reference the SEC’s “Ponzi” characterization. (*See id.* at pp. 2-6, 46-58). A tremendous number of these articles are readily

that appeared in Vermont publications or were posted to Vermont media websites, and (2) broadcast journalism stories from Vermont radio or television stations or Vermont media podcasts. The 1,233 print articles listed were collected using Westlaw and supplemental internet searches. The list of broadcasts in Levine Decl. Ex. 1 are only a sample of the broadcasts that aired during the relevant period, reflecting what could be accessed through local television stations’ and *Vermont Public Radio*’s websites, since there appears to be no aggregation service for local television or radio news broadcasts comparable to the Westlaw service for print media. The comprehensiveness of broadcast information included in Levine Decl. Ex. 1 is thus substantially limited by each station’s decisions about what to post and maintain and other facts and circumstances (e.g., WCAX-TV’s available coverage is almost entirely limited to the period after the station came under new ownership in 2017). Additionally, news coverage or bulletins that aired on local radio other than *Vermont Public Radio* are unavailable and not included in Levine Decl. Ex. 1.

available to potential jurors on the internet. In fact, the case has such a hold on the public imagination in Vermont that a number of media outlets have created specific webpages to aggregate and promote their years of case coverage.³⁸ The *Vermont Digger*—which appears to have run more stories on the allegations in the case than any other outlet (see Levine Decl. Ex. 1 at pp. 32-46)—even attributed the doubling of its audience to its coverage of this case, characterizing Mr. Quiros and this case as its “game-changer story.” (Levine Decl. Ex. 136.)

Broadcast news coverage of this case has likewise been extensive and inflammatory.³⁹ To date, such coverage includes, for example, at least 63 stories on *Vermont Public Radio* (see Levine Decl. Ex. 1 at pp. 61-68);⁴⁰ at least 16 stories since September 25, 2017 on WCAX-TV’s local news or other news programs (such as YCQM, “You Can Quote Me”) (see Levine Decl. Ex. 1 at

³⁸ See VERNONT DIGGER, <https://vtidigger.org/eb5-an-investigation/>; BURLINGTON FREE PRESS, <https://www.burlingtonfreepress.com/topic/e7b85534-67f5-44d3-9a1f-ecd7464be71d/eb-5-in-vermont/>; CALEDONIAN RECORD, https://www.aledonianrecord.com/news/eb/collection_dbe5c36a-0e24-11e6-a4ad-f722f3c476bd.html.

³⁹ See *supra* n.37, regarding limitations on the availability of information about broadcast media coverage of the case.

⁴⁰ See, e.g., Peter Hirschfeld, ‘Dark Day for Vermont’: NEK Developers Allegedly Duped Investors Out of Millions, VERNONT PUBLIC RADIO (Apr. 14, 2016), <https://www.vpr.org/post/dark-day-vermont-nek-developers-allegedly-duped-investors-out-millions#stream/0>; Feds Charge Northeast Kingdom Developers with ‘Ponzi-Like’ Fraud, *supra* n.10, <https://www.vpr.org/post/feds-charge-northeast-kingdom-developers-ponzi-fraud>; Peter Hirschfeld, As State Settles Civil Case Against EB-5 Fraudster, Scott Says ‘Dark Cloud’ Beginning to Lift, VERNONT PUBLIC RADIO (July 12, 2018), <https://www.vpr.org/post/state-settles-civil-case-against-eb-5-fraudster-scott-says-dark-cloud-beginning-lift#stream/0>; EB-5 Development: 4 Named in Criminal Indictment Filed in Federal Court Over NEK Project, *supra* n.31, <https://www.vpr.org/post/eb-5-development-4-named-criminal-indictment-filed-federal-court-over-nek-project#stream/0>.

pp. 65-88);⁴¹ and at least 11 stories on NBC 5 (see Levine Decl. Ex. 1 at pp. 61-67).⁴² Like some of the local print media websites, *Vermont Public Radio* has created a webpage to aggregate and promote its years of case coverage.⁴³ Additionally, this case has been singled out for special in-depth coverage. For example, the *Vermont Digger* focused on the case in a 24-minute podcast entitled “From biotech ‘dream’ to federal court” for its weekly *Deeper Dig* series (see Levine Decl. Ex. 154),⁴⁴ and *Vermont Public Radio* focused on the case in a 27-minute podcast entitled “What’s the Plan for the Pit in Newport?” for its monthly *Brave Little State* series (see *Brave Little State* Podcast).⁴⁵ The first four minutes of the *Brave Little State* Podcast exemplify the pervasiveness of Vermont media’s broadcast news coverage related to this case—they present the reporter’s version of the EB-5 “investment fraud scheme”—identifying Mr. Quiros and Mr. Stenger as the parties responsible—primarily through an arrangement of audio clips from previous broadcasts.⁴⁶

⁴¹ See also, e.g., *YCQM* Feb. 10, 2019, *supra* n.12, <https://www.wcax.com/content/news/YCQM-Feb-10-2019-505639701.html>; *Vermont Announces EB-5 Settlement*, *supra* n.12, <https://www.wcax.com/content/news/Scott-Donovan-to-make-EB-5-announcement-in-Newport-488011591.html>; *Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History*, *supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html>; *Is the State of Vermont Responsible for the Alleged Kingdom Con?*, *supra* n.12, <https://www.wcax.com/video?vid=477322593>.

⁴² See also, e.g., *Businessman in Jay Peak Fraud Case Agrees to Pay Back \$81M*, *supra* n.18, <https://www.mynbc5.com/article/businessman-in-jay-peak-fraud-case-agrees-to-pay-back-dollar81m/16025442> (not available for download); *VT AG: Ariel Quiros Should Acknowledge Role in EB-5 Fraud*, *supra* n.23, <https://www.mynbc5.com/article/vt-ag-says-quiros-should-acknowledge-role-in-eb-5-fraud/16628478#> (not available for download).

⁴³ See *VERMONT PUBLIC RADIO*, <https://www.vpr.org/term/eb-5#stream/0>.

⁴⁴ See *Deeper Dig*, *supra* n.17, <https://vtidigger.org/2019/06/03/deeper-dig-biotech-dream-federal-court/>.

⁴⁵ *Brave Little State*, *supra* n.31, <https://www.vpr.org/post/new-brave-little-state-whats-plan-pit-newport-0>.

⁴⁶ *Id.* at 00:00 – 03:43.

The Vermont media's intense public scrutiny of this case has not dissipated over time. *See e.g., Jacques*, 2011 WL 1706770, at *8 (considering the diminution in coverage over the passage of time in deciding a motion to transfer). To the contrary, spurred by United States Attorney Nolan's recent press conference, there have been dozens of stories about the case in the local media within the last several months, many of which have made inflammatory statements about Mr. Quiros and commented on or presumed his guilt.⁴⁷ Since Nolan's press conference, for example, the *Vermont Digger* published a June 1, 2019 article headlined "In Newport, EB-5 scandal lingers with dashed hopes and a 'whopping great hole'" that referenced Mr. Quiros and Nolan's "announcement on the site of one of those failed projects, now a big hole in the ground in downtown Newport" (Levine Decl. Ex. 153 at 2); it published a June 2, 2019 article characterizing Mr. Quiros and the other defendants being "hauled into court in handcuffs" as "marking a key milestone in what authorities say was a long-running sophisticated Ponzi scheme—and the biggest fraud in the history of Vermont" (Levine Decl. Ex. 131 at 1); it released the *Deeper Dig* podcast on June 3, 2012 in which a reporter claimed it was "obvious" that the AnC Vermont Project "was completely fraudulent";⁴⁸ on July 17, 2019, *Seven Days* published a cartoon depicting Mr. Quiros's imminent homicide (Levine Decl. Ex. 158); on July 9, 2019, *Vermont Public Radio* aired its "What's the Plan for the Pit in Newport?" podcast, which discussed how "the hole" has

⁴⁷ *See, e.g., YCQM May 26, 2019*, WCAX-TV (May 26, 2019), <https://www.wcax.com/content/news/YCQM-May-26-2019-510432691.html> at 04:19 – 05:06 (Part II) (WCAX-TV highlighting Nolan's press conference statements that AnC Bio was "all bogus to line the developers' pockets" and playing clips of Nolan stating that "the defendants lied and they cheated," deceiving "Vermonters [who] are trusting people").)

⁴⁸ *Deeper Dig*, *supra* n.17, <https://vtdigger.org/2019/06/03/deeper-dig-biotech-dream-federal-court/> at 01:53 – 02:02.

“become a central character” and the “physical embodiment of the [EB-5] scandal”,⁴⁹ and on August 2, 2019, the *Vermont Digger* published an article reporting on private civil litigation against the State (but none of the defendants in this case), which stated without qualification that “the immigrants in the EB-5 program who invested in the Jay Peak were defrauded in the Ponzi scheme” and that Mr. Quiros and Mr. Stenger “commingled, misused and stole money” (Levine Decl. Ex 159 at 2).

To his considerable prejudice, by sheer force of repetition, Mr. Quiros’s presumed guilt has become indelible in Vermont, and Nolan’s press conference in front of “the pit” once again made that prominent in the public imagination.

B. THE COVERAGE HAS BEEN INCENDIARY

In addition to the sheer volume of coverage, its inflammatory nature also supports application of the presumption of prejudice. Unlike prior cases in this District addressing similar motions, the media coverage is not limited to factual reporting, but includes hundreds of stories that have adopted the Government’s narrative and convicted Mr. Quiros before he has had his day in Court. *See Jacques*, 2011 WL 1706770, at *6-7 (finding that the opinion pieces were “not particularly hostile to [the defendant] personally, and many do not mention his name at all” and do not use “inflammatory” language). With increasing frequency over time, media reports have presented the Government’s allegations as facts without acknowledging that Mr. Quiros has never admitted or been found by a jury to have engaged in any wrongdoing.⁵⁰ (Levine Decl. Ex. 100 at

⁴⁹ *Brave Little State*, *supra* n.31, <https://www.vpr.org/post/new-brave-little-state-whats-plan-pit-newport-0> at 03:16 – 03:29.

⁵⁰ *See, e.g., As State Settles Civil Case Against EB-5 Fraudster, Scott Says ‘Dark Cloud’ Beginning to Lift*, *supra* n.40, <https://www.vpr.org/post/state-settles-civil-case-against-eb-5-fraudster-scott-says-dark-cloud-beginning-lift#stream/0> at 00:00 – 00:08 (“Vermont has reached

1 (“According to published reports, developer[] Ariel Quiros . . . misused \$200 million of investor funds using the state-run EB-5 visa program. The Securities and Exchange Commission stopped what’s been called a ‘Ponzi-like scheme’ . . .”); Ex. 153 at 2 (“According to court records, Stenger and Quiros misused \$200 million of the roughly \$450 million they raised from overseas investors”)).

The following is just a small sample of the prejudicial coverage of Mr. Quiros by the Vermont media.

Seven Days. In perhaps the worst example of the media vilification of Mr. Quiros, *Seven Days*—the newspaper with the largest circulation in Vermont (see Levine Decl. Ex. 91)—published a cartoon in which a gleeful local citizen is about to murder Mr. Quiros by pushing him into “the hole,” which the cartoon labels the “Ariel Quiros Renaissance Block Fraud Pit.” (Levine Decl. Ex. 158.) *Seven Days* has also published multiple inflammatory editorials and op-eds opining both on the fact that a fraud occurred and on Mr. Quiros’s guilt. One such op-ed ran the statement that “Vermont’s EB-5 scandal is generally seen as the biggest fraud scheme in state history and in the 25 years of the federal EB-5 program” under a picture of Mr. Quiros, Mr. Stenger, Mr. Kelly and others. (Levine Decl. Ex. 124 at 1.) *Seven Days* has also repeatedly published articles that refer to Mr. Quiros’s conduct as a Ponzi or Ponzi-like scheme (see, e.g., Levine Decl. Ex. 70 at 1; Ex. 84 at 1; Ex. 106 at 1; Ex. 111 at 1), including one in which a reporter lamented that his “Biggest Reporting Regret” was that he did not refer to the Jay Peak Projects as a “Ponzi scheme” years earlier (Levine Decl. Ex. 111).

a settlement with the man who orchestrated one of the biggest financial crimes in State history.”).

Times Argus and Rutland Herald. Both the *Times Argus* and the *Rutland Herald* have similarly used incendiary language to refer to Mr. Quiros and the AnC Vermont project. For example, an editorial entitled “The biggest fraud” characterized the case as “[t]he biggest financial fraud in Vermont’s history” and labeled Mr. Quiros and Mr. Stenger as the “two accused masterminds.” (Levine Decl. Ex. 123 (*Rutland Herald*).) The editorial also likened Mr. Quiros and Mr. Stenger to the “Trump family,” characterized them as “shady operators” who got their hands on a “pot of money,” and accused them of “[m]aking off with money from foreign investors” and “stealing the hopes of Vermonters who had seen glimmers of a renaissance for a region that could use it.” (Levine Decl. Ex. 122 at 2; Ex. 123 at 2-3.) Similarly, both the *Rutland Herald* and *Times Argus* published an editorial entitled “Fatal taint.” (Levine Decl. Exs. 118 & 127.) The *Rutland Herald*’s editorial further described this case as “[t]he biggest financial scandal in Vermont history” and accused Mr. Quiros and Mr. Stenger of “concoct[ing] a mammoth Ponzi scheme.” (Levine Decl. Ex. 118 at 1.) This editorial similarly compared Mr. Quiros and Mr. Stenger to “the sister of . . . President Donald Trump’s son- in- law” who had been “hawking EB-5 visas in China” and painted Vermonters as Mr. Quiros’s victims:

Vermonters have felt the sting of EB-5 corruption. Empty building sites in downtown Newport [referring to “the hole”] are a reminder of the faith that local residents had placed in Stenger and the hopes that were dashed. Development at Burke Mountain and Jay Peak resumed after the projects were put in receivership, but many Vermonters have learned what it feels like to be *played for chumps*.

(*Id.* (emphasis added).)

The Vermont Digger. The *Vermont Digger* not only commented on Mr. Quiros’s guilt, but took credit for uncovering the alleged fraud. For example, in August 2017, *Vermont Digger* founder Anne Galloway participated in a podcast entitled “How a Small News Outlet Brought Down the State Hero [referring to Mr. Stenger].” (Levine Decl. Ex. 120.) The host credited Galloway and her team with uncover a “Ponzi-like scheme” involving Mr. Quiros and Mr. Stenger

relating to their EB-5 projects. (*Id.* at 2.) In a June 2019 podcast and article called “The Deeper Dig: From biotech ‘dream’ to federal court,” Galloway stated that “Quiros has been kind of blamed as the mastermind and you know, the real evil one, who was behind the scenes making all this happen.” (Levine Decl. Ex. 154 at 4.)⁵¹ The *Vermont Digger* published a video on its own site in which Galloway again expresses her view that it was “obvious” that the AnC Vermont Project “was completely fraudulent.”⁵² And the *Vermont Digger* was critical of the United States Attorney’s Office for failing to bring criminal charges sooner. (Levine Decl. Ex. 148.)

WCAX-TV. WCAX-TV amplified the notoriety of the case by branding dozens of case-related stories broadcast on its local news and other programs with the incendiary catchphrase “Kingdom Con.”⁵³ For example, on the day of the Indictment was filed, WCAX-TV devoted most of its local news broadcast to the case, leading its broadcast with the statement “[t]he other shoe drops in the Kingdom Con.”⁵⁴ The reporter “who broke the news” reported from “the hole”—where United States Attorney Nolan had held her press conference just hours earlier—which he

⁵¹ *Deeper Dig*, *supra* n.17, <https://vtdigger.org/2019/06/03/deeper-dig-biotech-dream-federal-court/> at 06:40 – 06:48.

⁵² Mike Dougherty, *How a Vermont Biotech Project Triggered Federal Fraud Charges*, VERNONT DIGGER (June 2, 2019), <https://vtdigger.org/2019/06/02/vermont-biotech-project-triggered-federal-fraud-charges-video/> at 03:20 – 03:28.

⁵³ See, e.g., YCQM Feb. 10, 2019, *supra* n.12, <https://www.wcax.com/content/news/YCQM-Feb-10-2019-505639701.html>; *Vermont Announces EB-5 Settlement*, *supra* n.12, <https://www.wcax.com/content/news/Scott-Donovan-to-make-EB-5-announcement-in-Newport-488011591.html>; *Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History*, *supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html>; *Is the State of Vermont Responsible for the Alleged Kingdom Con?*, *supra* n.12, <https://www.wcax.com/video?vid=477322593>.

⁵⁴ *Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History*, *supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html> at 00:01 – 00:03.

described using language from Nolan's press release as "probably the most visible *scar* of the EB-5 scam involving the developers up at Jay Peak – a hole here in the heart of downtown Newport that was supposed to have been redeveloped as part of this big plan. But federal investigators say it was all a scheme."⁵⁵ The web story linking to the coverage that aired notes that Mr. Quiros "is painted as the decision-maker of the Kingdom Con" and links to a "Timeline of the Kingdom Con" (Levine Decl. Ex. 164 at 3), while the coverage itself included segments entitled "Kingdom Con By the Numbers"⁵⁶ and "Kingdom Con Failed Promises."⁵⁷ The lead reporter remarked that the people of Newport "are reminded of the failed promise of EB-5 every day" because, as the reporter standing at "the hole" stated, "AnC Bio didn't happen along with those jobs, but this did happen [gesturing toward "the hole"] – an entire block gone as part of that alleged scandal."⁵⁸ Other WCAX-TV stories referred to Mr. Quiros as "the man at the heart of the EB-5 Kingdom Con case." (See, e.g., Levine Declaration Ex. 163.)

Other Vermont Media Outlets. Multiple other media outlets have similarly opined on both the crime and Mr. Quiros's guilt using inflammatory language:

- *Burlington Free Press*: stating that that the "dream" of bringing jobs to Vermont's poorest region "vanished with the revelation of what investigators said was a massive Ponzi-like scandal orchestrated by Quiros and Stenger. The pair were alleged by the U.S. Securities and Exchange Commission to have misused more than \$200 million in EB-5 investor funds, including at least \$50 million 'misappropriated' by Quiros for personal use to pay his taxes and buy condos in New York, among other expenses." (Levine Decl. Ex. 140 at 1.) This article also quoted the manager of the Trapp Family Lodge who sponsored a different Vermont-based EB-5 project as stating "'It's unfortunate that some bad actors took advantage of the state's trust and are now causing trouble for a lot of people.'" (*Id.* at 2.)

⁵⁵ *Id.* at 00:41 – 00:59 (emphasis added).

⁵⁶ *Id.* at 05:30.

⁵⁷ *Id.* at 06:55.

⁵⁸ *Id.* at 7:07 – 7:26.

- Caledonian Record: commenting on the SEC and State cases that “authorities were clear that it was Quiros who was the alleged mastermind of the ‘Ponzi-like’ scheme” and reporting Commissioner Pieciak’s comparison of Mr. Quiros to Bernie Madoff. (Levine Decl. Ex. 115 at 1.) In a subsequent piece entitled “Editorial: Court of Public Opinion,” this outlet commented on the Indictment as follows: “The picture that emerges from all this is, as we see it, this: Bill Stenger was a well-respected, talented, and popular businessman sincerely interested in creating economic growth in the Northeast Kingdom. . . . He somehow fell in with Quiros and his associates, who took over the financial management while Stenger actually ran the Jay Peak ski area, hotel, water park, and condos, and did the bulk of the fund raising with the foreign investors.” (Levine Decl. Ex. 155 at 2.)
- Green Mountain Daily: comparing this case to that of the former manager of the Backstreet Boys and NSYNC who was convicted for his involvement in a “twenty-year Ponzi scheme” and stating “Now, thanks to a simple twist of fate, the SEC (and indirectly to Carlo “Charles” Ponzi), Bill Stenger and Ariel Quiros share more with NSYNC’s Justin Timberlake than ever dreamed possible.” (Levine Decl. Ex. 66 at 1.)
- St. Albans Messenger: publishing a piece entitled “Jay Peak and lost trust” that noted that the “story” regarding Mr. Quiros has “been dubbed ‘Kingdom Con’” and included the following quote from a Vermont Business Magazine editorial entitled “An end to innocence in Vermont”: ““What is perhaps the greatest tragedy of this entire episode is the discovery that the confidence we had in our state’s immunity from the greed and deceit common elsewhere was probably never legitimate in the first place. It was just an illusion – a wish for how we would like Vermont to be.”” (Levine Decl. Ex. 96 at 1-2.)

Letters to the Editor and Comments from Potential Jurors. The print media outlets have published letters and comments from readers who similarly expressed their views on Mr. Quiros’s guilt using inflammatory language. By way of example:

- A May 5, 2016 *Vermont Digger* commentary from a reader likened Mr. Quiros to General Custer and characterized Mr. Quiros as “claim[ing] Jim Douglas begged him to fleece the whole state of Vermont”; claimed that one of the companies that contracted with Mr. Quiros’s projects walked off the job because they “smelled the skunk before anybody” and referred to a “stench of fraud” that was “unmistakable.” (Levine Decl. Ex. 94 at 1-2.)
- In September 2016, the *Times Argus* published a letter from a reader that stated: “It is fascinating, in a way, to speculate on the Ponzi scheme perpetuated by Bill Stenger and Ariel Quiros with the EB-5 Program that was first started in 2008. It is apparent that the scheme was first set in motion during the time of former Governor Jim Douglas, who obviously paid no attention to the machinations of Stenger and Quiros. . . . We now know that Bumblin and Moulton were completely negligent in allowing Stenger to set up the Ponzi scheme while his confederate Quiros was the outside man who actually misappropriated the \$200 million.” The letter expressed the “hope[]” that Mr. Stenger “will eventually get his just dessert and face criminal charges[.]” (Levine Decl. Ex. 107 at

1-2.)

- In March 2018, the *Caledonian Record* published a letter to the editor opining that Mr. Quiros “should be in jail for quite sometime [sic],” referring to him and his partners as “thieves” and suggesting that Mr. Quiros did not do any jail time because “he is loaded.” (Levine Decl. Ex. 134 at 1.)

* * * *

Accordingly, both the volume and incendiary nature of the pretrial publicity strongly support the conclusion that the Court should presume prejudice and transfer this case to another District.

C. THE GOVERNMENT BEARS RESPONSIBILITY FOR THE PREJUDICIAL PUBLICITY

The Government and its investigative partners, including, but not limited to, the SEC, the Vermont Attorney General’s Office and the Vermont Department of Financial Regulation, bear significant responsibility for the prejudicial publicity in this case. The media feeding frenzy around Mr. Quiros began with the SEC’s and the Vermont Attorney General’s Office decision to leverage the sensational aspects of their allegations and maximize publicity by announcing their civil suits on the same day, presenting coordinated sets of allegations. The SEC’s press release gave the case the readily understood short-hand phrase suffused with fraud and criminality—“Ponzi-like”—that has lodged in the public imagination and remains the media’s canned tag line for the case three-and-a-half years later. The Vermont Attorney General’s Office and the State maximized publicity and public attention by giving the Governor the lead-off role in announcing its civil case against Mr. Quiros—despite the fact that Governor Shumlin is a central player in the alleged fraudulent conduct.

Mr. Quiros never emerged out from under the stigma with which the Government’s coordinated show of force marked him on April 14, 2016, but that was only the beginning. The Vermont Attorney General’s use of the Governor at its press conference in a gubernatorial election

year, combined with the State’s substantial involvement in the EB-5 programs, ensured the rapid politicization of the case. After years of taking credit for Mr. Quiros’s successes in the Northeast Kingdom, government officials uniformly wielded their influence and used their bully pulpit to tear him down, typically deflecting attention from their own involvement with the Jay Peak and AnC Vermont Projects. The persistent scapegoating of Mr. Quiros by Government officials and politicians culminated in United States Attorney Nolan’s irresponsible press conference announcing charges against Mr. Quiros in front of “the hole,” where she and her Office falsely associated it with the charged fraud and deliberately encouraged the misimpression that Vermonters were the victims of the charged offenses even though the Indictment makes no such allegation.

1. State and Federal Officials Took Credit for the Successes of Mr. Quiros and His Partners

State and federal officials’ roles in the media circus that has surrounded this case started well before the filing of any civil or criminal charges against Mr. Quiros. In the six years leading up to the filing of the SEC’s and State’s complaints, federal and state officials were falling over themselves to take credit for Mr. Quiros’s and his partners’ great work in revitalizing the Northeast Kingdom. For example, (i) then-Governor Douglas issued a press release following a 2009 AnC Vermont Project signing ceremony in South Korea that took credit for “bringing millions in new investment to Vermont businesses and hundreds of new jobs to our state at this critical time” (Levine Decl. Ex. 9 at 1); (ii) Senator Leahy’s office sent an email pressuring Governor Shumlin to reference Leahy’s leading role in the EB-5 program during Shumlin’s first inaugural address—“on EB5 you need to recognize Leahy and only Leahy” (Levine Decl. Ex. 161); (iii) Shumlin boasted in a 2013 *Vermont Public Radio* interview that the role he played in inducing EB-5 project

investments was “probably the most important ingredient”;⁵⁹ and (iv) Shumlin asserted during the 2014 gubernatorial debate that he personally created jobs in Vermont by “work[ing] hard to bring capital into the state” through the EB-5 program (Levine Decl. Ex. 47 at 1).

State and federal officials also participated in multiple media events for the Jay Peak and AnC Vermont Projects, including events related to the latter’s launch. These include an August 2011 event headlined by Senator Leahy and Governor Shumlin at the Gateway Center in Newport “to announce a new biomedical research and manufacturing plant that will bring hundreds of jobs to the village,” referring to the AnC Vermont Project (Levine Decl. Ex. 17 at 1); and the September 2012 Press Events, an all-day press blitz to promote multiple economic projects including the AnC Vermont Project (*see, e.g.*, Levine Decl. Ex. 20; Ex. 23).

Based on the publicity largely generated by State and federal officials, Mr. Quiros was hailed as a hero for years in the State of Vermont. His lionization only made his subsequent public shaming and disavowal by his erstwhile champions more impactful and inflammatory. And by all appearances, Vermont politicians’ strategy to divert attention from their own conduct by blaming Mr. Quiros has succeeded, for reasons that are easily understood—the press conference United States Attorney Nolan gave at “the hole” demonstrates the easy and powerful appeal of a fictionalized story about an outsider gaining riches by betraying promises that puffed up the hopes of a trusting people, especially as compared to stories of politicians’ and government officials’ garden variety venality and self-serving conduct.

⁵⁹ Governor Peter Shumlin, *supra* n.3, <https://www.vpr.org/post/governor-peter-shumlin-0#stream/0> at 04:40 – 04:51.

2. Government Officials Repeatedly Make Inflammatory Statements to the Press Concerning Mr. Quiros

Federal and state officials, who coordinated the announcements of their parallel civil cases against Mr. Quiros, bear significant responsibility for the prejudicial publicity based on their repeated inflammatory public statements that have influenced the press's coverage of Mr. Quiros and this case. The State's press announcement established how aggrieved Vermonters should feel. Having failed to recuse himself and instead chosen to participate in announcing the State's civil lawsuit against Mr. Quiros, then-Governor Shumlin told Vermonters that “[w]e all feel betrayed” and that “[i]t's a dark day for Vermont.”⁶⁰ Attorney General Sorrell added that the case was worse than a “simple bank robbery.”⁶¹

The SEC's use of the inflammatory phrase “Ponzi-like” in its litigation press release framed the case for the public. The press followed along, filing dozens of stories that include the “Ponzi” scheme reference. (*See, e.g.*, Levine Decl. Ex. 63 at 1 (“The federal Securities and Exchange Commission on Thursday unveiled a civil fraud complaint charging a ‘Ponzi-like scheme.’”); Ex. 143 at 1 (characterizing Quiros as “the accused mastermind of what SEC attorneys as well as Vermont state officials have likened to a Ponzi scheme”)). The State's and SEC's prejudicial conduct resulted in an avalanche of publicity that was highly prejudicial to Mr. Quiros.

As the *Caledonian Record* aptly stated, state officials “ruined [Mr. Quiros and Mr. Stenger] with a single press conference.” (Levine Decl. Ex. 92 at 1.) The *Caledonian Record* further opined that:

The feds called it a “massive fraud” and painted Quiros and Stenger as really terrible actors. ***Online chatter suggests the populist masses are ready to take up***

⁶⁰ *Vermont Digger, Officials: Quiros and Stenger Diverted \$200 Million from EB-5 Investors, supra* n.6, <https://www.youtube.com/watch?v=JXXrNtjq8Pc> at 38:21 – 38:26.

⁶¹ *Id.* at 21:48 – 22:04.

their pitchforks. That, of course, is what the press-conference was intended to accomplish.

(Levine Decl. Ex. 86 at 1 (emphasis added).)

Moreover, State officials continued to make prejudicial statements to the press even after the press conference. These include the press interview given by Commissioner Pieciak—who is on the Government’s Preliminary Witness List—in April 2017 during which he compared Mr. Quiros to Bernie Madoff and suggested that Mr. Quiros even fooled his lawyers. (Levine Decl. Ex. 115 at 3.) Pieciak further commented that Mr. Quiros’s purchase of a condo at Trump Place ““was a perfect encapsulation of what happened”” and was ““obviously not legal.”” (Levine Decl. Ex. 116 at 1.) The inflammatory comments also include remarks by Governor Scott and Attorney General Donovan at a 2018 press conference falsely suggesting that Newport residents were the victims of Mr. Quiros’s alleged fraud scheme and that Mr. Quiros’s settlement of the suit amounted to an admission of wrongdoing.⁶²

3. The United States Attorney’s Office’s False and Misleading Press Conference and Press Release Resulted in Substantial Additional Prejudicial Publicity

United States Attorney Nolan exacerbated the prejudicial publicity through an irresponsible and misleading offsite press conference at the “Renaissance Block,” also known as the “Spates Block.” As shown above, prior to the Indictment, the press had designated this

⁶² Compare *Vermont Announces EB-5 Settlement*, *supra* n.12, <https://www.wcax.com/content/news/Scott-Donovan-to-make-EB-5-announcement-in-Newport-488011591.html> at 01:13 – 01:16 (Attorney General Donovan that the settlement “satisfy[ies] the principles of accountability”) with *VT AG: Ariel Quiros Should Acknowledge Role in EB-5 Fraud*, *supra* n.23, <https://www.mynbc5.com/article/vt-ag-says-quiros-should-acknowledge-role-in-eb-5-fraud/16628478> at 00:48 – 00:51 (Attorney General Donovan stating “I think accountability here is some form of admission”) (not available for download).

location—pejoratively referred to as “the hole,” “the pit,” “the big hole” or “the massive hole”—as the symbol of the alleged civil fraud scheme, even though it was not mentioned in the SEC or State complaints, and had used this symbol to reinforce the mistaken notion that it was primarily the people of Vermont who were “betrayed” by the alleged conduct.⁶³ The only reference in the Indictment to “the hole” is an allegation that the defendants used \$250,000 from the administrative fees that they received from AnC Vermont Project investors “as an initial payment for the purchase of a property known as the ‘Spates Block’ in Newport, Vermont, where the defendants planned to construct a future EB-5 project.” (Indictment ¶ 43.) Demolition of the dilapidated properties formerly located at “the hole” not only had nothing to do with the charges in this case, but was requested by Newport city officials to prevent them from becoming fire and safety hazards. (Levine Decl. Ex. 71 at 1.)

When she decided to hold the press conference at “the hole,” United States Attorney Nolan clearly knew about the history of prejudicial articles associating Mr. Quiros with it, or, at a minimum, knew of the close connection in the public mind between “the hole” and Mr. Quiros’s alleged fraudulent scheme. Despite the absence of any substantial nexus between “the hole” and the scheme charged in the Indictment, Nolan nonetheless chose to hold the press conference there in order to maximize press coverage by catering to and stoking a pre-existing and pervasive public outrage. This decision foreseeably and inevitably caused extreme prejudice to Mr. Quiros.

⁶³ See, e.g., *Brave Little State*, *supra* n.31, <https://www.vpr.org/post/new-brave-little-state-whats-plan-pit-newport-0> at 3:10 – 3:37 (splicing together clips from three other broadcasts referring to the razed block as the “massive hole in the ground,” the “giant hole in the ground,” and the “gaping wound in the center of Newport”); *Stenger, Quiros Allegations Leave Newport Residents Feeling Betrayed*, *supra* n.10 <https://www.mynbc5.com/article/stenger-quiros-allegations-leave-newport-residents-feeling-betrayed/3021858> at 00:09 – 00:15 (not available for download).

Nolan's response to a reporter's question "why are we in front of the hole?"⁶⁴ gives away the game. Nolan said that "[w]e thought it was important to do this in the place in Vermont that was most shook, most rocked, most affected by this fraud."⁶⁵ This purported justification is tantamount to conceding that she intended to summon the public's outrage at Mr. Quiros and Mr. Stenger, but it is also false and misleading for multiple reasons, including that not a single Vermonter, let alone any Newport resident, is alleged to be a victim of the alleged fraudulent scheme and that the Indictment contains no allegation about the dilapidated buildings formerly located at "the hole" having been razed. Following her false and misleading press conference, Nolan issued a false and misleading press release that included a quotation from the FBI similarly suggesting that the "physical scar on the city of Newport" related to the "broken business promises" alleged in the Indictment. (Levine Decl. Ex. 151 at 1-2.) Again, the Indictment made no such allegation.

Nolan's false and misleading statements courted public prejudice, and she therefore bears full responsibility for the prejudice that in fact followed. Such prejudicial publicity in the wake of her press conference includes, but is not limited to, multiple broadcast and print stories that incorrectly linked the charges against Mr. Quiros to the "hole," "pit" "scar" in downtown Newport. (See, e.g., Levine Decl. Ex. 153 at 2 ("The federal prosecutor made that announcement on the site of one of those failed projects, now a big hole in the ground in downtown Newport."); Ex. 150 at 2 (quoting FBI Special Agent in Charge James N. Hendricks, stating "defendants' broken business promises have left not only a physical scar on the city of Newport, but also an intangible scar on

⁶⁴ U.S. Attorney Announces Criminal Charges in EB-5, *supra* n.26, <https://www.youtube.com/watch?v=68xdsIvtM6E> at 14:52 – 14:53.

⁶⁵ *Id.* at 15:10 – 15:18.

the promise of economic development for the Northeast Kingdom"); Ex. 130 at 2 ("Federal prosecutors held a press conference Wednesday afternoon in Newport in front of the infamous 'hole' in downtown. The vacant lot was slated to be where one of the EB-5 projects developed was built, but it's sat empty in the years since the alleged fraud came to light.").)⁶⁶ It also includes a cartoon featuring the imminent homicide of Mr. Quiros by being pushed into and buried in "the hole." (Levine Decl. Ex. 158.) In fact, *Vermont Public Radio* commented in July 2019 that "[c]overage of the case rarely fails to mention the 'giant hole,' or the 'massive hole,' or the 'gaping wound.'" (Levine Decl. Ex. 157 at 2.)

Accordingly, the Government's responsibility for the prejudicial publicity further supports the application of the presumption of prejudice in this case.

D. OTHER FACTORS SUPPORT APPLICATION OF A PRESUMPTION OF PREJUDICE

1. Vermont's Size Increases the Likelihood of Prejudice

The likelihood of prejudice due to adverse publicity increases in a smaller District like the District of Vermont. *See Skilling*, 561 U.S. at 382 (comparing a jury pool of 4.5 million to the 150,000 residents of the jurisdiction at issue in *United States v. Rideau*, 373 U.S. 723 (1963), where the Court applied a presumption of prejudice). Here, the jury pool will be drawn from the Southern Jury Division, which comprises Addison, Bennington, Orange, Rutland, Windham, and Windsor Counties. [ECF No. 45 at 2; *Plan for the Random Selection of Grand and Petit Jurors*

⁶⁶ *Kingdom Con: Criminal Charges Filed in Largest Fraud in Vermont History, supra* n.12, <https://www.wcax.com/content/news/Charges-Coming-in-Kingdom-Con-510222141.html> at 0:42 – 00:53 ("Probably the most visible scar of the EB-5 scam involving the developers up at Jay Peak, a hole here in the heart of downtown Newport that was supposed to have been redeveloped as part of this big plan. A hole, here, in the heart of downtown Newport that was supposed to have been redeveloped as part of the big plan. But federal investigators say it was all a scheme.").

for Service within the District of Vermont, § 4 (D. Vt. 2019).] According to the latest population estimates available from the U.S. Census Bureau, the Southern Jury Division as of July 1, 2018 had a population of approximately 258,000 persons, of whom approximately 212,000 were age 18 or older. (Levine Decl. Ex. 156.) The size of the Southern Jury District jury pool is comparable to the jury pool size in *Rideau*, which the *Skilling* Court indicated increased the likelihood of prejudice. *See Skilling*, 561 U.S. at 382. The small size of the jury pool further supports application of the presumption of prejudice in this case.

2. The Politicization of this Case Increases the Likelihood of Prejudice

The politicization of this case—characterized by prominent Vermont politicians echoing the media’s unproven allegations against Mr. Quiros in order to score political points or to distance themselves from their own involvement in the Jay Peak and AnC Vermont Projects—is unprecedented in Vermont and strongly weighs in favor of applying a presumption of prejudice. Trial of Mr. Quiros’s case in the court of public opinion was inevitable, given the role of state officials in promoting and supervising the Jay Peak and AnC Vermont Projects and the well-publicized history of Vermont politicians seeking to take credit for those Projects’ successes. Indeed, Vermont’s EB-5 projects have been a focal point of State politics since at least 2006. To Mr. Quiros’s detriment, a public trial is exactly what occurred. In the wake of the SEC’s sensational April 2016 announcement, Vermont politicians publicly debated who deserved credit for investigating the alleged fraud and scrambled to publicly accuse opponents of bearing responsibility for the allegations in the SEC complaint, always assuming in these public statements that what happened was in fact fraud and that the SEC’s allegations were true.

Shumlin, who solicited investors for the EB-5 projects, fired an opening salvo at the State’s April 14, 2016 press conference announcing its civil lawsuit against Mr. Quiros by taking credit for the case and emphasizing that the alleged fraudulent activity began “three years before I

became Governor.”⁶⁷ Shumlin’s predecessor Governor Douglas, who had also solicited EB-5 investors, quickly “took exception to Shumlin directing blame his way,” adding that he “could do the same thing and say this is (U.S. Sen.) Pat Leahy’s baby.” (Levine Decl. Ex. 75 at 2.) The *Times Argus*’s lead stated the obvious: “Vermont pols” were “looking to distance themselves” from Mr. Quiros, Mr. Stenger, and the EB-5 projects. (*Id.* at 1.)

In fact, the *Times Argus* story’s focus was the reactions to the State’s announcement from contenders in the race for Governor that was then taking place. Lieutenant Governor Phil Scott, a Republican candidate issued a “blistering statement” that neglected to mention the accolades he had previously lavished on Mr. Quiros, Mr. Stenger and the Jay Peak Projects:

At a minimum there appears to be a significant lack of oversight on this project. We need immediate answers to basic, yet essential, questions. What went wrong at Jay Peak and Q Burke? How was this allowed to deteriorate to the point it is now? What steps, if any, did the Administration take to prevent this from happening?

(*Id.*)

Both Republican primary contenders and Shumlin’s Democratic primary challengers sought to turn Mr. Quiros’s public notoriety to their own political advantage, pointing out opponents’ connections to Mr. Quiros and the EB-5 projects and treating them as *prima facie* evidence of opponents’ corruption. For example, Democratic gubernatorial primary candidate Peter Galbraith held an April 18, 2016 press conference where he attacked Governor Shumlin by levying charges that Mr. Quiros’s and Mr. Stenger’s campaign contributions to Shumlin had violated campaign finance laws. (Levine Decl. Ex. 78 at 1 (“Both [Mr. Quiros and Mr. Stenger] used corporations they owned and controlled as a device to circumvent limits on individual

⁶⁷ *Vermont Digger, Officials: Quiros and Stenger Diverted \$200 Million from EB-5 Investors, supra* n.6, <https://www.youtube.com/watch?v=JXXrNtjq8Pc> at 4:45 – 4:48.

contributions. From 2010 to 2014 the two provided more than \$74,000 to Gov. Shumlin’s election campaigns and to the Vermont Democratic Party.”). Galbraith suggested that Mr. Quiros’s and Mr. Stenger’s donations bought preferential State treatment for their projects, called for an investigation of the State’s role and whether public money was used to support the projects (ignoring the fact that EB-5 programs of necessity rely only on money from non-U.S. investors seeking green cards), and hinted that Shumlin’s personal connection to the EB-5 projects reflected a corrupt arrangement. (*Id.* at 1-2.) Bruce Lisman, another Republican primary candidate, similarly seized on Mr. Quiros’s public notoriety to accuse Governor Shumlin of political corruption, calling on Shumlin to return campaign contributions from Mr. Quiros and Mr. Stenger to the court-appointed receiver in the SEC action. (Levine Decl. Ex. 70 at 2.) (adding that the “public trust between the people of our state and politicians leading our state has long been broken. It’s time to address these issues head on”). In response, Shumlin’s spokesperson did not defend the propriety of the contributions, but said that Vermont Republicans were no less corrupt because they also had “received contributions from one or both of the men”: “I assume Lisman is including Jim Douglas . . . and the Vermont Republican Party” in his call to return campaign contributions. (*Id.* at 3.)

Another strategy adopted by gubernatorial candidates from both parties was to publicly impugn the competence of the Shumlin administration for having allowed Mr. Quiros’s presumed fraud to go undetected. Democratic candidate Matt Dunne sent a public letter to Democratic candidate Sue Minter, former Agency of Transportation Secretary under Shumlin, that questioned her qualifications because she approved a contract for a company owned by Mr. Quiros to run a small regional airport, even though that contract was unrelated to any EB-5 projects. (Levine Decl. Ex. 104; *see also* Levine Decl. Ex. 101-103.) In the letter, Mr. Dunne wrote:

In recent days, our campaign received the attached sole sourced contract executed between the State of Vermont and Ariel Quiros to operate the Newport State Airport, a contract you signed as Secretary of Transportation.

Much has been written about the Q Burke EB-5 debacle since April, when it culminated with the SEC charging Quiros and Bill Stenger with a “ponzi-like” scheme in the worst scandal in Vermont’s history. . . .

This contract was signed well after the administration had raised concerns internally, after related projects had been shut down, and after experienced business people like Tony Pomerleau had walked away from deals with these individuals. I am not an expert on state airport contracts, and given that fact, and in the name of transparency, I’m hopeful you can provide further information in response to the following questions:

It’s clear that the Shumlin administration had concerns about these projects before the date on which you signed the contract, even changing the way state oversight was conducted. Were you aware of those concerns at the time you executed the contract?

Why did you believe that it was appropriate to sign a state contract with Ariel Quiros after concerns had been raised about his business practices?

What due diligence did you conduct to ensure this contract passed muster?

Why was Q-Resorts deemed the only vendor capable of providing the necessary services at the state airport in Newport?

(Levine Decl. Ex. 104 at 1-2.) The two candidates then sparred over this letter during the televised Democratic primary debate, with Minter referring to Dunne’s attempt to link her to Mr. Quiros as a “smear campaign.” (Levine Decl. Ex. 103 at 2.)

Republican candidate Phil Scott, in a second statement issued shortly after the announcement of the State’s lawsuit, also questioned the Shumlin administration’s competence: “Even after repeatedly failing to provide compliance information to state regulators, they [Stenger and Quiros] were allowed to raise more money.” (Levine Decl. Ex. 98 at 1.) Shumlin’s office responded to Scott by suggesting that his statement was hypocritical (*id.*), and Dunne also attacked Scott’s statements as hypocritical:

Phil Scott touted the Northeast Kingdom's EB-5 program for years, despite the fact that alarms started sounding publicly as early as 2012. As recently as November 2015, despite the fact that it was public knowledge that the projects were under investigation. In the midst of a political campaign, Scott is attempting to change the record on his support to cover a failure to stand up against the EB-5 ponzi scheme even when he had information that questionable business practices were putting small businesses and Newport's entire downtown at risk.

(Levine Decl. Ex. 99 at 1.) Notably, no politician involved in these exchanges defended themselves by pointing out that no wrongdoing by Mr. Quiros had been proved; rather, they counter-alleged that their attacker had stronger ties to Mr. Quiros or had been more involved or enthusiastic about the EB-5 projects. In a campaign for statewide office, the general adoption of this strategy by numerous candidates only occurs if they can all safely assume that the public—statewide—already believes that a fraud took place and that Mr. Quiros perpetrated it. And the fact that politicians on both sides of the aisle publicly fought over the proper apportionment of blame as to everyone except Mr. Quiros—whom all assumed guilty—powerfully reinforces the public's belief in Mr. Quiros's guilt.

Compounding the prejudice to Mr. Quiros caused by politicians' public efforts to assign or avoid responsibility for the Jay Peak and AnC Vermont Projects, some of these same politicians are likely to be trial witnesses in this case. Shumlin and Douglas are already on the Government's Preliminary Witness List. In addition to Shumlin and Douglas, Senator Leahy, Senator Sanders, and Representative Welch, could also be witnesses for at least some of the parties. Given that these individuals have held or continue to hold statewide elected office, jurors will likely have formed clear and firm opinions about them that will impair any fair assessment of their testimony. Other politicians who have publicly smeared Mr. Quiros are also likely to be witnesses in this case, including Patricia Moulton (already on the Government's list) and Michael Pieciak (same).

Current events demonstrate daily that strong partisan affiliation or a felt sense of personal loyalty to a particular politician can outweigh the weight of evidence. This is all the more

problematic for Mr. Quiros since members of *both* parties have prominently, repeatedly, and publicly condemned him. Accordingly, the politicization of this case strongly weighs in favor of the presumption of prejudice and therefore further supports transfer of this case to another District.

* * * *

In sum, this District has never before seen an individual defendant subjected to the pervasive and inflammatory prejudice that is present in this case. This is the rare case where the inflammatory prejudicial publicity has fostered a “pattern of deep and bitter prejudice . . . present throughout the community” such that the pretrial publicity has displaced the judicial process. *Jacques*, 2011 WL 1706770, at *4 (alteration in original) (quoting *Irvin*, 366 U.S. at 727). Accordingly, the Court should apply the presumption of prejudice and transfer venue over this case to another District.

II. THE UNITED STATES ATTORNEYS LEADING THIS MATTER HAVE CONFLICTS OF INTEREST THAT REQUIRE DISMISSAL OF THE INDICTMENT OR, AT MINIMUM, AN EVIDENTIARY HEARING

Due process requires that criminal matters be directed by a disinterested prosecutor. Here, relationships between the two United States Attorneys who oversaw the investigation leading to the Indictment—Eric Miller and Christina Nolan—and the key federal and state officials involved in the relevant events, resulted in conflicts of interest that tainted this investigation and violated Mr. Quiros’s rights.

As shown above, Vermont’s current and former senior elected officials, including, but not limited to, Senators Leahy and Sanders, Representative Welch and former Governors Douglas and Shumlin, played key roles in the conduct underlying the charges in the Indictment. No fair-minded person could believe that any investigation, much less one spanning more than five years, could credibly be conducted without thoroughly evaluating the role that these and other officials played in this matter. Yet, as discussed below, that appears to be what has occurred here, presenting a

reasonable potential that Miller and Nolan's connections to these officials allowed for such an incongruous and unjust result.

This concern is not mere speculation, as the Government has confirmed that United States Attorney Miller's conflicts resulted in the Department of Justice authorizing his recusal in April of 2016. However, this alleged recusal came too late, at least a year after the investigation began. As a result, Miller's litany of conflicts appears to have tainted the investigation and, like the publicity discussed above, steered it away from developing an objective factual record on the key role the senior federal and state officials played in this matter. United States Attorney Nolan also labors under conflicts of interest and has continued on the same investigative course set by Miller.

The shortcomings of this investigation are stark: (1) prior to indicting Mr. Quiros, the Government failed to interview Senators Leahy and Sanders, Representative Welch, or members of their respective staffs; (2) Governors Douglas and Shumlin were only interviewed after the Indictment was returned; (3) the investigation did not seek to develop a record of the role that state and federal officials played, and steered away from pursuing key information in this regard; and (4) the Government failed to secure key evidence from the State even after it was publicly revealed that the State had destroyed and withheld evidence subject to the Government's subpoena. As a result, this matter was indicted without a fair and objective evaluation of the evidence, which has led to these wrongful charges against Mr. Quiros.

Prior to bringing this motion and in the hopes that it would not be necessary, in July 2019, Mr. Quiros sought to confer with the Government to develop a complete understanding of the Government's handling of the conflict issues and what steps, if any, the Government took to attempt to safeguard the integrity of its investigation. However, in September 2019, the Government refused to provide any information, other than confirming that United States Attorney

Miller’s recusal in April 2016 was “based on existing conflicts of interest or the appearance of conflicts of interest pertaining to this matter,” disclaiming the existence of any other conflicts, and declining to provide additional information. (Levine Decl. Ex. 144.)

As demonstrated below, and based on the current record, Mr. Quiros has made a *prima facie* showing of a violation of his due process right to a disinterested prosecutor which, if unrebutted, should result in a dismissal of the Indictment and disqualification of certain prosecutors. Should the Government wish to join issue, the Court should hold an evidentiary hearing, with appropriate discovery prior to the hearing, to allow this issue to be resolved on a full record.

A. DUE PROCESS REQUIRES A DISINTERESTED PROSECUTOR

The Supreme Court has characterized a defendant’s right to a disinterested prosecutor as “fundamental” because a conflicted prosecutor “undermines confidence in the integrity of the criminal proceeding.” *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion). “The absence of an impartial and disinterested prosecutor has been held to violate a criminal defendant’s due process right to a fundamentally fair trial.” *State of New Jersey v. Imperiale*, 773 F. Supp. 747, 750 (D.N.J. 1991). As the Supreme Court stated:

Prosecution by someone with conflicting loyalties “calls into question the objectivity of those charged with bringing a defendant to judgment.” It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.

Young, 481 U.S. at 810 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)).⁶⁸

⁶⁸ There is also a statutory bar prohibiting any prosecutor “from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof.” 28 U.S.C. § 528; *see also* 28 C.F.R. § 45.2(a) (2019) (prohibiting any Justice Department employee from participating in a criminal

The improper participation of an interested prosecutor “calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision.” *Young*, 481 U.S at 812. One remedy for a due process violation resulting from a conflicted prosecutor is dismissal of the indictment. *See Wright v. United States*, 732 F.2d 1048, 1055-56 & n.8 (2d Cir. 1984) (citing *People v. Zimmer*, 434 N.Y.S.2d 206, 208 (N.Y. 1980)). Where such a violation has occurred, the defendant is not required to show actual prejudice. *See id.* at 1056. Rather, given “the practical impossibility of establishing that the conflict has worked to defendant’s disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice.” *Id.* (quoting *Zimmer*, 434 N.Y.S.2d at 208).

B. MILLER’S AND NOLAN’S CONFLICTS CREATE A REASONABLE POTENTIAL FOR PREJUDICE

Here, the reasonable potential for prejudice standard is met. There is no question that the United States Attorney’s Office’s investigation has been affected by conflicts. As the Government acknowledged, Miller was recused in 2016. But it appears that Miller directed the investigation for a least a year during which the investigatory approach appears to have been shaped and tainted.

In April 2016, Miller made a public statement about the investigation:

“As always, we’re doing this by the book[.] . . . Under clear Department of Justice rules, I have not and will not play any role in decisions that relate to the governor’s administration—including decisions on the scope of the federal investigation as it could relate to state agency actions.”

investigation or prosecution where he or she has a “personal or political relationship” with “(1) [a]ny person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) [a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”).

(Levine Decl. Ex. 84 at 2.) Department of Justice rules, however, do not permit partial recusals, *see* 28 C.F.R. § 45.2(a), and for good reason—there is no way to determine what happened or who is responsible by only looking at half the story. Given that this case concerns the operation of a governmental program in which the federal and state officials are key parts of the story, Miller’s comment evidences precisely the bias which creates the key concern, as his statement suggests that the investigation can be divided between a review of private and governmental conduct. Given the circumstances, Miller’s statement is objectively irrational, but consistent with the conflicts created by his, and Nolan’s, ties to many of the political players touched by this investigation.

Both Miller’s and Nolan’s connection to Senator Leahy is a cause for reasonable concern. Senator Leahy’s influence over matters in Vermont is plainly very significant. To this end, Senator Leahy recommended both Miller and Nolan to serve as United States Attorney, and for Nolan that recommendation came while this investigation was ongoing. In fact, Leahy issued press releases touting that it was his recommendation that led to both Miller’s and Nolan’s appointments. (Levine Decl. Ex. 53; Ex. 119.) Given that Senator Leahy’s own conduct is central to any objective investigation of this matter, his influence over the appointment process raises serious concern. A similar concern is raised for Senator Sanders’s and Representative Welch’s influence here as well.

With respect to Miller, he also was acting under a litany of other conflicts. His wife, Liz Miller, served as Governor Shumlin’s Chief of Staff from approximately January 2013 to May 2015, and was substantially involved in the conduct at issue in this case. (Levine Decl. Ex. 84 at 1-2.) During Liz Miller’s time in this role, Shumlin was extensively involved in the promotion and marketing of the Jay Peak and AnC Vermont EB-5 Projects, including directly soliciting investors on trips to Miami, South America, and Asia. (Levine Decl. 133 at 2.) Liz Miller was

personally involved in formalizing the relationship between Department of Financial Regulation and ACCD in connection with the Vermont Regional Center. (Levine Decl. Ex. 84 at 1-2.) In fact, the Government has recognized Liz Miller's key role in this matter, listing her on their Preliminary Witness List. In addition to being Liz Miller's boss, Shumlin received campaign contributions from both Millers. (*Id.* at 3.) Finally, Peter Welch also benefitted from the Millers as they “[b]oth . . . have given handsomely to Vermont Democrats over the years.” (*Id.*)

Despite these obvious conflicts, it appears neither United States Attorneys Miller nor Nolan properly recused themselves from this case based on the limited information that the Government provided to Mr. Quiros. (*See* Levine Decl. Ex. 144 (“We do not believe that you are entitled to information about our evaluation of [conflicts of interest] issues.”).) Miller led the Government's investigation for at least the first year. (*Compare id.* (stating that “[i]n April 2016, DOJ approved the recusal of then-U.S. Attorney Eric Miller based on existing conflicts of interest or the appearance of conflicts of interest pertaining to this matter.”), *with* Levine Decl. Ex. 145 at 1 (“The United States Attorney's Office (USAO) opened the criminal file on this matter in April 2015.”).) Nolan led the investigation after she became United States Attorney. Because of the Government's refusal to provide an accounting of the steps taken to address these conflicts, it is unclear whether Nolan has even brought her conflict to the attention of the Department of Justice as required under clear guidelines or taken other steps to address the conflict. *See, e.g.*, United States Attorney's Manual (“Justice Manual”) § 3-1.140 (requiring a United States Attorney to “promptly notify” the Executive Office for United States Attorneys' General Counsel Office upon “becom[ing] aware of circumstances that might necessitate his or her recusal.”). Accordingly, there is a reasonable potential for prejudice based on Miller's and Nolan's conflicts.

C. THE MANNER IN WHICH THE INVESTIGATION WAS CONDUCTED FURTHER SUPPORTS A FINDING OF REASONABLE POTENTIAL FOR PREJUDICE AND A FINDING OF ACTUAL PREJUDICE TO MR. QUIROS

It appears that the Government, first under Miller's lead, actively steered the case away from the federal and State officials with whom he had close ties, and that Nolan, who had her own conflicts, followed the same course. Unlike most cases, here there are objective indications of the tainted nature of this investigation based on the manner in which it has been conducted. Among other things, key witnesses were not interviewed and investigative steps to evaluate the role of federal and state officials played were not taken. As a result, evidence that would place Mr. Quiros' conduct in proper context and show he engaged in no wrongdoing was not developed and ignored.

1. The Government Failed to Interview Key Political Figures That Give Rise to the Conflict Concerns Prior to Indicting Mr. Quiros

On August 30, 2019, the Government produced "witness information for public employees with whom [they] have spoken," including "completed reports of interviews with those public employees and statements of those public employees" (the "Public Employee Reports").⁶⁹ (Levine Decl. Ex. 146.) The Government's production, as well as other communications, confirmed that it failed to interview key witnesses prior to indicting Mr. Quiros, including Senators Leahy and Sanders, Representative Welch and their respective staffs, and former Governors Shumlin and Douglas. These investigative failures are deeply troubling and on their face call into question the integrity of the investigation.

⁶⁹ Mr. Quiros will provide the Court with a copy of any of the Public Employee Reports, including the Report specifically quoted in the following section, upon request.

As shown above, Senator Leahy championed the EB-5 program and was extensively involved in the Jay Peak and AnC Vermont Projects. Among other things, Leahy traveled abroad to solicit investors for these Projects, attending marketing and promotional events in Vermont, and wrote a letter to Mr. Quiros and Mr. Stenger that was attached as an exhibit to the offering materials provided to investors. (*See supra* 13-14) Yet the Government never interviewed Senator Leahy or any current or former member of his staff. The Government similarly failed to interview Senator Sanders and Representative Welch, or any current or former member of their staffs, despite their involvement in marketing and promoting the projects. (*See* “Employee Reports.”)

Like Leahy, former Governors Shumlin and Douglas were extensively involved in the Jay Peak and AnC Vermont Projects, including soliciting investors and promoting these Projects. (*See supra* 5-16.) But the Government did not interview Shumlin or Douglas until after Mr. Quiros was indicted, even though both Shumlin and Douglas are on the Government’s Preliminary Witness List. When the interviews were finally conducted, the Government did not even ask Shumlin about the role of federal officials in the EB-5 project.

2. The Government Steered the Investigation Away from Federal and State Officials

The Public Employee Reports also reflect that the Government affirmatively steered the investigation away from questioning federal and state officials. For example, the interview report of former Department of Financial Regulation Commissioner Susan Donegan reflects that she volunteered exculpatory information that Senator Leahy’s office was applying pressure to move the projects forward, stating:

The Governor [Shumlin] did not want any restrictions on the JP [Jay Peak] projects. Donegan was concerned about the second PPM [Private Placement Memorandum] regarding AnC Bio. Patrick Leahy’s office and the Vermont State Legislators were on the Governor’s back trying to get the JP projects to move along accordingly.

According to Donegan's interview report, the Government did not ask any follow up questions regarding this statement, including failing to ask basic questions such as how she obtained this information or which individuals in Senator Leahy's office applied this pressure. As reflected in the Public Employee Reports, the Government similarly did not explore Leahy's or Vermont's other federal elected officials' roles in the EB-5 Projects with other witnesses, including Shumlin. In fact, Leahy, Sanders, and Welch are barely mentioned in the Public Employee Reports.

The Government also steered the investigation away from State officials. For years, the alleged victims in the charged scheme claimed that the State's involvement with the Jay Peak and AnC Vermont Projects was key to their investment. As reflected in a recent Vermont Supreme Court opinion reinstating portions of the investors' lawsuit against the Vermont Regional Center and State officials, these investors assert that

ACCD employees represented to prospective investors, including plaintiffs, that the added protections of state approval and oversight made the Jay Peak Projects a particularly sound investment. They told prospective investors that the VRC conducted quarterly reviews to ensure that projects complied with all applicable laws and regulations and "engag[ed] in the financial monitoring and auditing of projects to ensure legitimacy," and they represented that the MOUs imposed "strict covenants and obligations on the project to ensure compliance with all applicable laws and regulations."

Sutton v. Vermont Regional Center, No. 2018-158 (Vt. 2019), ¶ 4 (alteration in original). The investors allege that these representations, and the representations of other State officials, induced their investments in the Jay Peak and AnC Vermont Projects. (*Id.* ¶ 29.) Indeed, during a press interview in 2013, former Governor Shumlin characterized his and other State officials' roles "as the most important ingredient" in inducing foreign investment.⁷⁰

⁷⁰ Governor Peter Shumlin, *supra* n.3, <https://www.vpr.org/post/governor-peter-shumlin-0#stream/0> at 03:57 – 04:50.

The Government, however, failed to investigate these key facts. For example, the investor lawsuit alleges that former ACCD directors James Candido and Brent Raymond each made a series of misrepresentations directly to investors concerning the Vermont Regional Center's role in the Jay Peak and AnC Vermont Projects. *See, e.g., Sutton, No. 2018-158 ¶¶ 56-57.* The Government appears not to have interviewed Candido, and according to the report of Raymond's interview, appears to have never asked Raymond about the investors' allegations concerning the misrepresentations that he made to them, as well as other allegations in the lawsuit about his conduct.

3. The Government's Failure to Properly Preserve Key State Documents Casts Doubt on the Objectivity of the Investigation

No serious or objective investigation can be conducted without gathering and considering relevant evidence. Further, an investigation that appears to ignore evidence from key witnesses is suspect. Here, the Government failed to preserve relevant State documents and looked the other way as State officials destroyed and hid relevant documents, despite the fact that the Government advised Mr. Quiros that “[i]n 2018, the grand jury issued subpoenas to DFR, ACCD and the Governor's Office.” (Levine Decl. Ex. 145 at 2.) For example, based on the State's failure to comply with public records requests, the *Vermont Digger* filed a lawsuit seeking access to State documents that revealed that a substantial amount of State documents are destroyed, missing or hidden away. A report generated as a result of the lawsuit reflects that the State is unable to locate months of email communications of former ACCD director James Candido (who is identified on the Government Preliminary Witness List). (Levine Decl. Ex. 160 at 1.) “The Vermont Attorney General's Office was unable to locate the records in a database of 3 million pages of litigation hold documents in the Jay Peak case, or from the Agency of Digital Services archive, which retains the email of state employees, or external hard drives that were identified in response to a lawsuit

lodged by VTDigger in January.” (*Id.*) Not only does Mr. Quiros not have access to these 3 million pages of relevant documents, the United States Attorney’s Office has not obtained and secured these documents. The report further revealed that “an external hard drive containing emails belonging to Candido and other [ACCD] officials turned up in an agency storage closet during the review.” (Levine Decl. Ex. 135 at 6.) Notably, this hard drive did not include certain emails that the *Vermont Digger* had obtained from other sources “perhaps because those and other emails had been deleted.” (*Id.*)

The report also shows that the Attorney General’s Office does not appear to know the full scope of the problem, finding that “[i]t is possible and even likely that there may be other email data in similar ACCD archives.” (*Id.*) These severe problems even led Attorney General Donovan to concede that it was impossible to know what communications may still be missing. (*Id.*)

In addition, there is evidence that another former ACCD director, Brent Raymond, destroyed relevant documents. While in State government, Raymond supervised the Vermont Regional Center’s EB-5 projects, went on multiple foreign investor trips, personally solicited investors for the Jay Peak and AnC Vermont Projects and, as noted above, is a named defendant in the investor lawsuit. As reflected in one of the Public Employee Reports, the Government learned from another witness that some of Raymond’s emails are missing and likely destroyed. But remarkably, even though the Government interviewed Raymond one month after this witness made this disclosure, the Government appears to have never asked Raymond about his destruction of emails.

Moreover, the Government’s recent statements make clear that they have no interest, despite their obligation to seek the truth, in ensuring that relevant and exculpatory evidence in the State’s possession is properly preserved. Given the evidence of the destruction of documents by

State officials, Mr. Quiros asked for confirmation that the Government took necessary steps to “secure all relevant materials and prevent further spoliation” and asked the Government again to ensure that all evidentiary materials are preserved. (Levine Decl. Ex. 132 at 4.) In response, the Government not only refused to provide such confirmation, but took the position that it has no obligation to ensure that such materials are preserved. (*Id.* at 3.) The Government stated:

At this point, we decline to respond to your factual allegations about the State. As I recently wrote to you and reiterated in Court today, we do not agree that the SEC, the State of Vermont or the Receiver is part of the government’s prosecution team. You have had and continue to have the ability to request any third party to preserve information for this litigation. Nevertheless, I would be willing to forward your position and request to the SEC, the State, and the Receiver. We will ask the SEC to retain its files about its investigation and suit, but we do not understand the precise scope of your request with regard to the State or the Receiver. If you have specific language you would like conveyed to them, let us know, though we make no representations about how or if they will respond.

Your email also implies that we have a legal obligation to preserve certain information held by third parties, including witnesses, which they did not provide to the government. We are unaware [sic] of any such obligation. We have requested that the federal agents working with us preserve their interview notes.

(*Id.*) Given that this evidence relates to the actions of the Government’s own witnesses and is subject to subpoena, the Government’s complete lack of interest in obtaining such evidence is startling. Generally, if federal prosecutors learn that evidence subject to subpoena has been hidden, they aggressively investigate to determine if their investigation has been obstructed. There does not appear to be any explanation for the Government’s disinterest in this issue apart from the bias that appears to have tainted this investigation.

D. IF THE GOVERNMENT WISHES TO CONTEST THIS MOTION, AN EVIDENTIARY HEARING IS NECESSARY TO ALLOW FOR RESOLUTION OF THESE ISSUES ON A FULL RECORD

Based on the present record, Mr. Quiros has made a *prima facie* showing that, based on Miller’s and Nolan’s conflicts, there is, at minimum, a reasonable potential for prejudice and there is a reason to believe that Mr. Quiros has been actually prejudiced. Should the Government wish

to contest this issue, then it is proper to allow this matter to be determined on a full record. To this end, the Court should hold a hearing, following discovery to the defense, to allow the facts and circumstances concerning the conflict issues to be put before the Court. The hearing and discovery should explore, among other issues, the relationship and influence on the USAO by the federal and state officials involved in this matter, the manner in which the conflict issues were addressed, including any screening procedures or other steps employed by the USAO, and the manner in which investigatory decisions were made to determine if they had been tainted. If the United States Attorney's Office claims it has acted appropriately, it should welcome this inquiry as it presumably would support its actions. However, should the hearing further support Mr. Quiros's concern that he has been subject to prosecution by an interested prosecutor that has resulted in a tainted Indictment, the Court should dismiss the Indictment, disqualify the conflicted prosecutors, as well as any prosecutor not properly screened off from the taint, and order other relief that is just and proper. *See United States v. Hasarafally*, 529 F.3d 125, 127-28 (2d Cir. 2008) (acknowledging the propriety of screening procedures); *see also, e.g., United States v. Camisa*, 969 F.2d 1428, 1430 (2d Cir. 1992) (analyzing the presence screening procedures in determining whether an attorney's conflict should be imputed to others); *United States v. Morris*, 2018 WL 2088301, at *1 (E.D.N.Y. May 4, 2018) (same).

III. THE COURT SHOULD EVALUATE RECUSAL ISSUES FOR THE JUDGES OF THIS COURT

While Mr. Quiros is not suggesting that the Court has done anything improper or holds any bias, he brings to the Court's attention facts and legal authorities relevant to an evaluation of recusal issues for the Judges of this Court. Judicial conflicts present issues of constitutional and statutory dimension. The right to a “fair trial in a fair tribunal is a basic requirement of due process.”” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re*

Murchison, 349 U.S. 133, 136 (1955)). Most issues of judicial disqualification do not rise to a constitutional level, but are addressed through the federal judicial disqualification statute, 28 U.S.C. § 455(a) (“Section 455(a)”). *Id.* at 890. Section 455(a) provides that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The Second Circuit has stated that “[t]he goal of section 455(a) is to avoid not only partiality but also the appearance of partiality.” *Ligon v. City of New York*, 736 F.3d 118, 123 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014) (citations omitted.) Section 455(a) achieves that goal “by establishing an objective standard designed to promote public confidence in the impartiality of the judicial process.” *Id.* (citations omitted). Under this standard, a Judge should recuse him or herself when “a reasonable person knowing all the facts, [would] conclude that the trial judge’s impartiality could reasonably be questioned[.] Phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice could be done absent recusal?” *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992) (citations omitted). Because this rule “functions as a critical internal check to ensure the just operation of the judiciary . . . if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.”” *Ligon*, 736 F.3d at 123-24 (citations omitted).

An evaluation of the recusal issue is necessary here because of the relationships between the Judges of this Court and certain Government and defense witnesses with substantial involvement in the conduct at issue—specifically Senators Leahy and Sanders and former Governors Shumlin and Douglas. Senators Leahy and Sanders voted in favor of Your Honor’s nomination, and Senator Leahy issued a press release taking credit for recommending Your Honor to President Obama. Senator Leahy similarly took credit for recommending Judges Christina Reiss

and William K. Sessions, his former campaign manager, to the federal bench. Your Honor and Judge Reiss were also appointed to the Vermont State bench by former Governors Shumlin and Douglas, respectively, both of whom are listed on the Government’s Preliminary Witness List. As a result, absent recusal, Your Honor or another Judge in this District would be required to decide discovery and evidentiary issues relating to individuals who played a role in his or her judicial appointments.

In evaluating the recusal issue, we direct the Court’s attention to the following cases:

***Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009)**—this case involved a motion to recuse an elected State Supreme Court Justice who received substantial campaign contributions from the chief executive officer and chairman of one of the parties to a civil lawsuit. *Id.* at 872-73. The Court held that the Due Process Clause required recusal because the corporate officer’s “pivotal role in getting [the Justice] elected created a constitutionally intolerable probability of actual bias.” *Id.* at 882. The Court held that “[d]ue process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’” *Id.* at 885 (citations omitted).

***United States v. O’Brien*, 18 F. Supp. 3d 25 (D. Mass. 2014)**—the court held that recusal of the presiding judge was required under Section 455(a) based on “vague” contentions relating to their identification of a sitting district judge in that District as a potential trial witness. *Id.* at 28, 34. Through the judge’s testimony, the defendants sought to “draw explicit parallels between what he did and what they are alleged to have done (and which the indictment charges constitutes a crime).” *Id.* at 35. The defendants also intended to elicit testimony from the judge-witness that he viewed his own conduct as legal and ethical to suggest that “defendants’ behavior cannot have

been criminal because judges were engaged in similar behavior” and that they “likewise did not have the necessary *mens rea* to commit the crimes charged.” *Id.* Based on the defendants’ proffer, the presiding judge found that there was an appearance of partiality requiring his recusal, stating that:

[I]t seems clear that I would have to rule upon the validity of entire lines of questioning and that in all likelihood I would limit the testimony in multiple respects. That, in turn, would open me up to the criticism that I was excluding evidence not for proper reasons, but to shield my colleague from embarrassment. That issue at the very least raises a serious possibility that recusal may be appropriate.

Id. at 36. The presiding judge therefore felt “duty-bound” to recuse himself because “the paramount consideration is maintaining public confidence in the fairness and integrity of this proceeding.” *Id.* at 37.

United States v. Menendez, Cr. No. 15-155 (D.N.J. 2015)—in the District of New Jersey’s prosecution of Senator Robert Menendez, it was publicly reported that several District Judges recused themselves because Menendez had supported their nominations to the bench. (See Levine Decl. Ex. 55.)

Mr. Quiros respectfully asks the Court to consider the foregoing facts and legal authorities relevant to an evaluation of recusal issues.

CONCLUSION

For the foregoing reasons, Defendant Ariel Quiros respectfully requests that the Court transfer venue to another District Court in this Circuit, dismiss the Indictment or hold an evidentiary hearing based on the Government's conflicts of interest, evaluate recusal issues for the Judges of this Court, and grant such other relief as the Court deems just and proper.

Dated: New York, New York
October 15, 2019

By: /s/ Seth L. Levine
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